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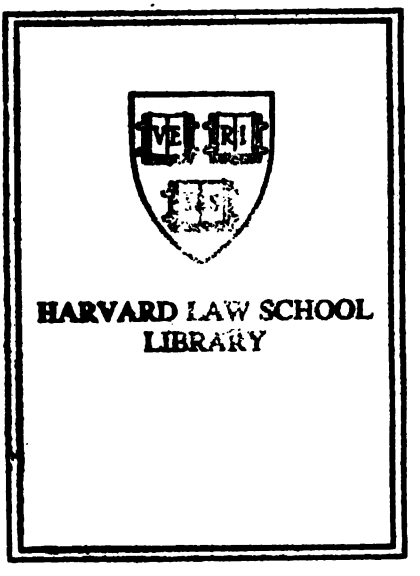

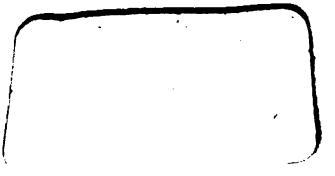

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MINNESOTA REPORTS

VOL. 78

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

NOVEMBER 9, 1899—JANUARY 24, 1900

HENRY BURLEIGH WENZELL
REPORTER

ST. PAUL
FRANK P. DUFRESNE
1901

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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE PEOPLE OF SAID STATE

Rec. Jan. 30, 1901

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JUSTICES

OF

THE SUPREME COURT

OF MINNESOTA

DURING THE TIME OF THESE REPORTS

Hon. CHARLES M. START, Chief Justice.
Hon. WILLIAM MITCHELL.[1]
Hon. LOREN W. COLLINS.
Hon. DANIEL BUCK.[2]
Hon. THOMAS CANTY.[1]
Hon. CALVIN L. BROWN.[3]
Hon. JOHN A. LOVELY.[4]
Hon. CHARLES L. LEWIS.[4]

DARIUS F. REESE, Esq., Clerk.

ATTORNEY GENERAL,
Hon. WALLACE B. DOUGLAS.

[1] Term of office expired December 31, 1899.
[2] Resigned November 14, 1899.
[3] Appointed November 20, 1899, to fill the vacancy occasioned by the resignation of Hon. Daniel Buck. Term for which elected commenced January 1, 1900.
[4] Term of office commenced January 1, 1900.

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NOTE

By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases in this volume are from the October, 1899, term calendar.

As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

CORRECTION

Vol. 77, page 283, 16th line from top of page should read:
"The consideration paid for the land was not the money or the property of."

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA.

ELLA HOEY v. O. S. ELLIS.

November 9, 1899.

Nos. 11,730—(29).[1]

Replevin—Judgment Erroneous under G. S. 1894, § 5420—Satisfaction.

In an action in replevin the jury found that the plaintiff was entitled to the possession of the property described in the complaint, and also found the value of the property. The plaintiff, who was the prevailing party, and in possession of the property at the time of the trial and rendition of the verdict, entered judgment thereon, and included therein the value of the property, and that, in case possession thereof could not be had, the plaintiff recover of the defendant the value thereof as found by the jury. This insertion of the value of the property in the judgment was error, under G. S. 1894, § 5420, but subsequently, and before the appeal to this court was taken by the defendant, the plaintiff duly satisfied the judgment. *Held*, that this satisfaction cured the error, and thereafter the defendant had no grounds of appeal.

Action of replevin in the district court for Hennepin county. The case was tried before Johnson, J., and a jury, which rendered a verdict that plaintiff was entitled to possession of the property described, and that its value was $600, and judgment was entered that plaintiff have immediate possession thereof and that in case possession could not be had she recover said sum. Plaintiff caused satisfaction of the judgment to be entered, and defendant appealed from the judgment. Affirmed.

[1] See note on page iv. supra.

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C. E. Brame, for appellant.
M. C. Brady, for respondent.

BUCK, J.

Action in replevin. Complaint alleges ownership and right of possession in the plaintiff, and that the property sought to be replevied is of the actual value of $600. Answer admits the alleged value of the property, denies the other allegations of the complaint, and demands a return of the property, or, in case a return thereof cannot be made, then that defendant recover the value thereof. Upon a trial the court instructed the jury that plaintiff was entitled to the immediate possession of the property described in the complaint. They further found the value of the property to be $600. This was the value of the property as agreed upon by the parties. In entering judgment, it adjudged that plaintiff have the immediate possession of the property, and, in case possession thereof could not be had, that plaintiff recover of the defendant the sum of $600.

At the time of the trial and entry of judgment the plaintiff, who was the prevailing party, was in the possession of the property, and, under G. S. 1894, § 5420, it was error to insert in the judgment its value. But after the entry of the judgment, and before this appeal was taken, the plaintiff duly satisfied the judgment; hence there was no further reason or grounds for appeal, as the defendant was not, and could not be, injured by the error in inserting the value of the property in the judgment.

The further point is made that the verdict does not respond to all the issues raised by the pleadings, viz., as to the ownership of the property. But the defendant did not allege in his answer that he owned the property replevied, nor that he was entitled to the possession, and, as no evidence is returned, there is no showing made by defendant as to who actually owned the property, and hence the defendant, by his own fault, failed to present a case where the jury could find a verdict responsive to the issue of ownership. Replevin is a possessory action in its character, and the right of possession merely is sufficient to enable a party to maintain replevin. Upon

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this point the jury found in favor of plaintiff. Judgment was entered accordingly, and we find no grounds for disturbing it.

Judgment affirmed.

SANDY HAMILTON v. MINNEAPOLIS DESK MANUFACTURING COMPANY.

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November 9, 1899.

Nos. 11,743—(61).

Safety of Building—Fire Department.

At common law the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building.

Same—Laws 1893, c. 7—Title of Act.

The constitution provides that "no law shall embrace more than one subject, which shall be expressed in its title." The title of Laws 1893, c. 7, is "An act providing for the protection of employees." *Held* that, though the provisions of the act are broad enough to include firemen of a public department, yet, under the title of the act, it must be deemed one exclusively for the protection of employees.

Negligence of Owner—Proof Required.

In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed upon him by statute for the benefit of somebody else, and that such person would not have been injured if the duty had been performed, but he must also show that the duty was imposed for his benefit or was one which the defendant owed him for his protection.

Action in the district court for Hennepin county to recover $5,000 for personal injuries. From an order, Pond, J., overruling a demurrer to the complaint, defendant appealed. Reversed.

Chas. A. Dalby, for appellant.

A fireman has only the rights of a licensee, while on the premises of another in discharge of his duty. Beehler v. Daniels, 18 R. I. 563; Beehler v. Daniels, 19 R. I. 49; Gibson v. Leonard, 143 Ill. 182; Woodruff v. Bowen, 136 Ind. 431; Cooley, Torts (2d Ed.) 367. Hence

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at common law plaintiff could not recover. Laws 1893, c. 7, confers no right of action. Under the constitution the title is part of the act. Sutherland, St. Const. § 86. The title fixes the bounds of the act. Board v. Baker, 80 Ind. 374; Matter of Tappen, 36 How. Pr. 390; State v. Garrett, 29 La. An. 637; Coutieri v. Mayor, 44 N. J. L. 58; Mississippi & R. R. Boom Co. v. Prince, 34 Minn. 71; Ex parte Moore, 62 Ala. 471; Matter of Blodgett, 89 N. Y. 392. The act will not be construed to extend its operation beyond the title. Bates v. Nelson, 49 Mich. 459. The title must express the subject comprehensively enough to include all the provisions of the act. Mewherter v. Price, 11 Ind. 199, 201; Ryerson v. Utley, 16 Mich. 269; Dorsey's Appeal, 72 Pa. St. 192; Ross v. Davis, 97 Ind. 79; Mayor v. Lewis, 12 Lea, 180; State v. Sullivan, 73 Minn. 378. The act must be construed as a police regulation, and is merely declaratory of the law. Grant v. Slater, 14 R. I. 381. Cf. Soutar v. Minneapolis I. E. Co., 68 Minn. 18; Hess v. Adamant Mnfg. Co., 66 Minn. 79. A person cannot be made liable for breach of a statutory duty, unless the duty is clearly imposed. Beehler v. Daniels, supra. Firemen are not within the purview of the act. Harty v. Central, 42 N. Y. 468; Holmes v. Central, 37 Ga. 593; Bell v. Hannibal, 72 Mo. 50; Ricketts v. East, 12 C. B. 160; East Tennessee v. Feathers, 10 Lea, 103. As to the time when liability attached under the act, see Grant v. Slater, supra; Maker v. Slater, 15 R. I. 112.

George W. Meyer, for respondent.

Plaintiff was on the premises as a matter of right. Parker v. Barnard, 135 Mass. 116; Learoyd v. Godfrey, 138 Mass. 315. An entry on land to save goods in danger of being destroyed by fire or other cause is not a trespass. Proctor v. Adams, 113 Mass. 376. An officer who enters premises in discharge of his duty is not a mere licensee, and may maintain an action for their defective condition. Parker v. Barnard, supra; Learoyd v. Godfrey, supra. If one who is lawfully on premises of another without fault or negligence falls through a hole thereon, the occupant will be held responsible. Addison, Torts (3d Ed.) 163; Gordon v. Cummings, 152 Mass. 513; Engel v. Smith, 82 Mich. 1; Parker v. Barnard, supra. A fireman may enter for protection of property. Inhabitants v.

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Gay, 120 Mass. 589. See Trask v. Shotwell, 41 Minn. 66; Sweeny v. Old Colony, 10 Allen, 368; Emery v. Minneapolis Ind. Exp., 56 Minn. 460.

Firemen come within the purview of the act. Tvedt v. Wheeler, 70 Minn. 161, 167. The title is not part of an act, and cannot control it. Proprietors v. Proprietors, 7 Pick. 344; Parker v. Barnard, supra. See also Woodruff v. Bowen, 136 Ind. 431; Beehler v. Daniels, 18 R. I. 563.

BUCK, J.

The plaintiff was a fireman in the employ of the fire department of the city of Minneapolis, and sustained an injury by reason of his falling through an unguarded elevator shaft in a factory in the possession and control of the defendant, not owned by it, but wherein it carried on the business of manufacturing desks, and to this end operated the elevator in question. The plaintiff entered the building in the discharge of his duty, as a member of said fire department, in response to a call to extinguish a fire originating in said building, and it was while in the discharge of such duty that he was so injured, through the negligence of the defendant in failing and omitting to fence and place guards around or inclose said elevator. The facts were alleged in the complaint, and defendant demurred, on the ground that sufficient facts were not stated to constitute a cause of action, and, this demurrer being overruled, the defendant appeals.

By the rules of the common law, a fireman going upon the premises of another, under the circumstances appearing in this record, could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building. Hence, if plaintiff has any right of action, it must be by virtue of Laws 1893, c. 7.

The body of the act may be broad enough to bring him within its provisions. It is undoubtedly the law that, in the absence of provisions requiring the subject of the act to be expressed in its title,

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the provisions of a statute may carry the act beyond its preamble or title. But, as our constitution requires the subject of the act to be expressed in the title, all provisions of the act not germane to the title (like the act under consideration, viz. "An act providing for the protection of employees"), are invalid, and are just the same as if they had never been incorporated in the act. Thus limited, the act becomes one exclusively for the protection of employees, and firemen would not come within its provisions. In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute for the benefit of somebody else, and that such person would not have been injured if the duty had been performed; but he must also show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection. Rosse v. St. Paul & D. Ry. Co., 63 Minn. 216, 71 N. W. 20.

The plaintiff, not having brought himself within the class intended by the statute to be protected and benefited, cannot rely on its violation as grounds for recovery, however meritorious a case he may seemingly have. The question is one worthy of serious legislative consideration, but the court cannot grant relief, for in law there is none.

Order reversed.

DAVID C. HULL v. CHARLES E. CHAPEL and Others.

November 9, 1899.

Nos. 11,882—(59).

Sheriff—Failure to Pay over Money—Deposit in Insolvent Bank.

On December 2, 1895, C., as sheriff, received money paid him on redemption from a foreclosure sale of real estate, which money he duly tendered H., the party entitled thereto, but who refused to accept the same. Subsequently, on July 24, 1896, H. duly demanded said redemption money of C., who, without lawful excuse, refused to deliver or pay it over to H. On August 18, 1896, C. deposited said money in a bank which shortly thereafter became insolvent and was placed in the hands of a receiver. On depositing said money in said bank, C. took a certificate

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of deposit, which he subsequently, after said bank became insolvent, tendered to H., who refused to accept it. *Held*, that C. was liable to H. for the amount of such redemption money from the date of the demand on July 24, 1896.

Action in the district court for Ramsey county to recover $1,548.50 on a sheriff's bond, executed by defendant Chapel as principal and by the other defendants as sureties. The case was tried before Brill, J., who found in favor of plaintiff and against defendant Chapel; and from a judgment entered pursuant to the findings, said defendant appealed. Affirmed.

John F. Fitzpatrick and *Fred M. Catlin*, for appellant.

John E. Stryker, for respondent.

BUCK, J.

The defendant Chapel was the sheriff of Ramsey county, Minnesota, from the first Monday in January, 1895, to the first Monday in January, 1897. Prior to that date the plaintiff owned a real-estate mortgage on a certain lot in Ramsey county, and, there being default in the amount due thereon, he, on November 26, 1894, foreclosed the same, and before the expiration of the period of redemption the premises were, on December 2, 1895, duly redeemed from such foreclosure sale, and the money paid to said Chapel, as sheriff of said county, for the use of plaintiff, who owned the sheriff's certificate; and said Chapel, within two or three days after the receipt of said redemption money, unconditionally tendered to the lawful agent of plaintiff the same, but said agent then refused to accept and receive said money. Subsequently, and on July 24, 1896, the plaintiff duly demanded payment of said sum from Chapel, which payment was then refused by him, and no part thereof has been paid to plaintiff by said Chapel.

His alleged excuse or justification for not paying over this redemption money to plaintiff is that on August 18, 1896, he, in good faith, deposited the amount thereof in the Minnesota Savings Bank, a going corporation then transacting business in St. Paul under the laws of the state of Minnesota, and then received from said bank a certificate of deposit for said money, payable to himself, or his order, and that on January 18, 1897, said bank became insolvent,

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but that he was ready and willing and offered to transfer and deliver said certificate of deposit to plaintiff, and so notified plaintiff's agent, as he had never received from said bank any portion of said redemption money so promised and received by him.

It is evident that this offer on the part of Chapel constitutes no defense. When plaintiff made the demand on Chapel on July 24, 1896, he had no legal right to withhold and retain the money from plaintiff, and his doing so constituted a conversion, and created a cause of action against him in behalf of plaintiff, and he was in no manner relieved of this liability by his subsequent conduct. Of course, his legal tender to plaintiff released the sureties upon his bond, but his own liability still existed, and he was under obligation to pay the amount over to plaintiff when properly demanded by him; and he shows no legal excuse for his refusal to pay. No action had been commenced against him for this money, and no one but plaintiff had made any demand upon him for the money, which he had deposited in his own name, and without notice to plaintiff where he had put the money.

Some question was made and controversy had over the construction to be placed upon the allegations of the complaint and answer relative to the amount of redemption money demanded by plaintiff of Chapel on July 24, 1896; that is, as to whether plaintiff demanded $1,548.50 or $1,521.36 as redemption money. But we think that this point is very decisively settled by the written demand itself, which contains this clause:

"I have demanded, and hereby demand, payment of the amount of moneys deposited with you on December 2, 1895, on account of such redemption. These moneys amount to (according to my figures) the sum of $1,545, making allowance for all credits to which the party attempting to redeem is entitled."

This is clearly a demand for the amount of the redemption money, whatever it might be. Plaintiff's agent figured it at a certain amount, but the amount demanded was the amount deposited with Chapel, for he says in plain language that it is the amount deposited with Chapel December 2, 1895, as redemption money, which he wishes Chapel to pay over. Of course, Chapel knew the exact amount, and was not depending on the figures of plaintiff's agent;

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and, had he paid the amount which he well knew was due, it would relieve him from this liability. Other questions were raised and discussed by counsel, but they need not be passed upon in this opinion, as doing so would not affect the result.

Judgment affirmed.

JOHN S. BILLINGS v. BOARD OF COUNTY COMMISSIONERS OF OTTER TAIL COUNTY.

November 9, 1899.

Nos. 11,831—(76).

Fees of Sheriff in Otter Tail County.

Under Sp. Laws 1891, c. 423, § 5, thereof, the sheriff of Otter Tail county is only entitled to receive for his services, in lieu of other compensation, 70 per centum of the fees and compensation provided by G. S. 1878, c. 70, § 11 (G. S. 1894, § 5550), or by any other law of the state applicable to said county, unaffected by the provisions of section 5 of said special law.

Action in the district court for Otter Tail county by plaintiff as sheriff of said county to recover $150.75 for services as sheriff. From an order, Baxter J., overruling a demurrer to the complaint, defendant appealed. Reversed.

C. L. Hilton, County Attorney, for appellant.

J. W. Mason and *C. C. Houpt*, for respondent.

BUCK, J.

The plaintiff, as sheriff of Otter Tail county, in this state, performed certain services, for which he made out an itemized and verified statement, and presented the same to the defendant board for allowance and payment; the services being charged at the full rates provided by G. S. 1878, c. 70, § 11 (G. S. 1894, § 5550). The bill amounted to $150.75, and the board deducted and disallowed $7 thereof, and allowed only 70 per cent. of the balance. Plaintiff appealed to the district court, and in his complaint against said board of county commissioners set forth the above facts, to which complaint the board demurred upon the ground that the complaint

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did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, with leave to answer.

There is no merit in the plaintiff's alleged cause of action, and the law seems quite plain against him. Sp. Laws 1891, c. 423, governs the case. The sections of the act particularly applicable to the point here involved are 3 and 5 thereof. Section 3 provides that the sheriff of said county shall be entitled to receive for his services, in lieu of other compensation, 70 per centum of the fees and compensation provided by G. S. 1878, c. 70, § 11 (G. S. 1894, § 5550), or by any other law of the state applicable to said county, save as therein otherwise provided. The plain legal effect of this section is to make the laws therein mentioned a basis for computing the sheriff's fees, viz., 70 per centum of what his fees would be if charged as provided by the laws mentioned in said section 5, and he was not entitled to collect any more than said 70 per cent. in the first instance nor at any other time. No further time need be given to a proposition so simple.

Section 5 of said law provides that,

"All parts of acts, so far as the same may be inconsistent with the provisions of this act, are hereby repealed, provided, that nothing in this section contained shall apply to section eleven (11) of chapter thirty (30) of General Statutes of 1878, nor to any general law of this state applicable to the office of sheriff."

This last section seems to have been inserted as a precaution against any claim or contention that section 5 could in any manner affect the laws therein mentioned, but to leave them intact, and also leave section 5 as a basis solely for fixing the fees of the sheriff of Otter Tail county at only 70 per cent. of the fees allowed by the general law or any other law of the state applicable to said county. Hence the trial court erred in not sustaining the defendant's demurrer to the plaintiff's complaint. It is conceded that the word "thirty" and the figures "30" in said section 5 are erroneous, and should read "seventy" and "70," respectively. See City of Winona v. Whipple, 24 Minn. 61.

Order reversed.

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JAMES MAGEE v. SCOTT & HOLSTON LUMBER COMPANY.

November 13, 1899.

Nos. 11,729—(89).

Contract to Tow Logs—Rescission.

The defendant, having nearly 7,000,000 feet of saw logs on the north shore of Lake Superior, which, when rafted, it desired towed up to its mill at Duluth, entered into a contract with the plaintiff, a Duluth tugman, to do the towing, and to assist the raftsmen with a tug in placing the booms in position and in making up the rafts. The contract contained a provision that, in case the services performed by the plaintiff should not be satisfactory, then, and in that event, the defendant reserved the privilege of terminating the contract at any time. The services to be performed by the plaintiff required skill and care, and more especially promptness in making up the rafts and in running them when made up, owing to the fact that they would be exposed to lake storms from certain directions. When the time arrived when defendant needed the services of the plaintiff with tugs, it, having ascertained that the plaintiff had left Duluth with his tugs without leaving word where he had gone, or how long he would be absent, employed another tugman to perform the services, and, when plaintiff returned, promptly notified him that the contract was terminated, and that it would not accept his services. The evidence was conclusive that the dissatisfaction of the defendant was actual and honest, and not simulated or fraudulently pretended. In an action by the plaintiff to recover the value of his contract, *held*, that the court properly directed a verdict for the defendant. The provision referred to, considered in the light of the nature, subject, and purpose of the contract, must be construed as reserving to the defendant the absolute and unqualified right at any time to terminate the contract, so far as still executory, whenever it was dissatisfied with plaintiff's performance of the work, without any right on part of the plaintiff to call in question the reasonableness or adequacy of the grounds of its dissatisfaction, provided, only, that the dissatisfaction was actual and not merely fraudulently simulated. It was not necessary that the plaintiff should have actually performed part of the services before the defendant terminated the contract. The dissatisfaction might be based on plaintiff's delay in commencing the work as well as upon the character of services already performed.

Action in the district court for St. Louis county to recover $2,000 on a contract. The case was tried before Moer, J.,.who directed a

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verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

A. A. Harris and *John H. Norton*, for appellant.

The contract amounts to an implied, if not express, agreement that defendant will allow plaintiff to commence work. 1 Addison, Cont. (9th Ed.) 299. If there is ambiguity, the words must be taken most strongly against the party employing them. McNeil v. Armstrong, 27 C. C. A. 16; Wetmore v. Pattison, 45 Mich. 439. Where work is to be done to the satisfaction of one party, there is a distinction between work which appeals to the taste, judgment or fancy of the party to be suited and work of which one person is as capable of judging as another. In the last class of cases, as in case of ordinary mechanical work or where quality of material is involved, the law holds that what in reason ought to satisfy a contracting party does satisfy him. Miesell v. Globe, 76 N. Y. 115, 117; Folliard v. Wallace, 2 Johns. 395; City v. Brooklyn, 47 N. Y. 475; Frary v. American Rubber Co., 52 Minn. 264. The contract falls within the second class, and hence the decision of the promisor is subject to review. Burns v. Munger, 45 Hun, 75; City v. Brooklyn, supra; Doll v. Noble, 116 N. Y. 230. The promisor cannot terminate the contract in an arbitrary and capricious manner. Duplex v. Garden, 101 N. Y. 387; Pope v. Best, 14 Mo. App. 502; McClure v. Briggs, 58 Vt. 82. The contract will be construed to mean that the work must be done to the satisfaction of a reasonable person. Keeler v. Clifford, 165 Ill. 544; Mullally v. Greenwood, 127 Mo. 138; Folliard v. Wallace, supra; Worthington v. Gwin (Ala.) 43 L. R. A. 382; Blackburn v. Reilly, 47 N. J. L. 290; Lake Shore v. Richards, 152 Ill. 59. See also Daggett v. Johnson, 49 Vt. 345, 348; Hartford v. Brush, 43 Vt. 528.

Billson, Congdon & Dickinson, for respondent.

"Satisfactory," as used in the contract, means satisfactory to defendant. McCormick Harvesting Mach. Co. v. Chesrown, 33 Minn. 32; Singerly v. Thayer, 108 Pa. St. 291; Adams v. Schnader, 155 Pa. St. 394, 403; Campbell P. P. Co. v. Thorp, 36 Fed. 414. The parties have a right to enter into such a contract. Taylor v.

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Brewer, 1 M. & S. 290; Andrews v. Belfield, 2 C. B. (N. S.) 779. Thus in contracts involving personal taste. Gibson v. Cranage, 39 Mich. 49; Zaleski v. Clark, 44 Conn. 218. In contracts to be continued by one party so long as satisfactory to the other, the honest, though unreasonable, judgment of the latter is conclusive. Allen v. Mutual, 101 Ala. 574; Provost v. Harwood, 29 Vt. 219; Durgin v. Baker, 32 Me. 273; Rossiter v. Cooper, 23 Vt. 522; Spring v. Ansonia, 24 Hun, 175; Tyler v. Ames, 6 Lans. 280; Singerly v. Thayer, supra; Smith v. Robson, 148 N. Y. 252; Alexis v. Young, 59 Ill. App. 226, 229. A contract for manufacture or sale of personal property, to be satisfactory to the purchaser, is to be literally construed, without inquiry whether the purchaser ought to be satisfied. Thus in cases of agricultural machinery. McCormick Harvesting Mach. Co. v. Chesrown, supra; Wood v. Smith, 50 Mich. 565, 570; Osborne v. Francis, 38 W. Va. 312; Plano v. Ellis, 68 Mich. 101; Goodrich v. Van Nortwick, 43 Ill. 445. So in other cases. McCarren v. McNulty, 7 Gray, 139; Campbell P. P. Co. v. Thorp, supra; Aiken v. Hyde, 99 Mass. 183; Silsby Co. v. Town of Chico, 24 Fed. 893; Singerly v. Thayer, supra; Adams v. Schnader, supra; Brown v. Foster, 113 Mass. 136; Hartman v. Blackburn, 7 Pitts. Leg. J. 140. It is only in cases where the dissatisfied party will necessarily continue in enjoyment of the fruits of the other's labor that the court will infer that the parties could not have meant what the contract seems to imply. O'Dea v. City of Winona, 41 Minn. 424.

MITCHELL, J.

On April 27, 1898, the defendant, having nearly 7,000,000 feet of saw logs at Burlington Bay and the mouth of the Stewart river, on the north shore of Lake Superior, which it desired towed to its mill in Duluth, entered into a written contract with the plaintiff by the terms of which the latter, for an agreed consideration, undertook to do all the tug work in towing the logs, including keeping a tug at the landing whenever the booms were there, placing the booms in position so that the rafting of the logs might be performed in the most expeditious manner, and assisting the raftsmen in making up the rafts and inclosing the booms when filled, and in caring for the booms when only partially filled, and, in case of storms, remov-

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ing them to a place of safety. The contract does not state when the work under it should commence, but it is clear from the evidence that both parties intended and expected that it would be in the very near future. The contract closed with the following provision, upon the construction and legal effect of which the decision of this case entirely depends:

"It is furthermore mutually agreed by the parties hereto that, in case the services performed by the party of the second part shall not be satisfactory, then, and in that event, the party of the first part reserves the privilege of terminating this contract at any time."

When the time arrived (about May 10) when the defendant required the services of the plaintiff with a tug down at a place where the logs were being rafted, Mr. Scott, one of the members of the company, and its general manager, went to direct the plaintiff to go down with a tug to assist the rafters, and to bring up a raft, but found that he had gone away with both his tugs without leaving word as to where he had gone or how long he would be absent. (It afterwards appeared that he had gone down the lake on a three-days trip to tow up a lot of cedar posts.) Thereupon Mr. Scott employed another party to go down with tugs and perform the service, and, when plaintiff returned, promptly notified him that the contract was terminated, and that the defendant would no longer receive or accept his services. Thereupon plaintiff brought this action to recover the value of his contract.

Upon the trial the evidence on part of the defendant was mainly directed to showing that it had reasonable and adequate grounds for terminating the contract, while that on part of the plaintiff was directed to showing that it had no such grounds for terminating the contract, but that plaintiff was justified by the acts and statements of the defendant in assuming that his services would not be required before his return from the three-days trip down the lake. The evidence is conclusive that the dissatisfaction of the defendant was real and honest, and not simulated, or merely fraudulently pretended. When the evidence closed, the court directed a verdict for the defendant.

If the contract is to be construed as reserving completely to the

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defendant the right of decision whether plaintiff's performance of the services was satisfactory to it (provided, only, that its decision was honest, and not fraudulent or simulated), without being required to disclose the reasons, or account for its action, and without any right on the part of the plaintiff to question the reasonableness or adequacy of the grounds of defendant's decision, then the court properly directed a verdict. In such case it would be enough that the defendant honestly willed to terminate the contract. If, on the other hand, the contract is to be construed as meaning that the defendant undertook to found its determination upon grounds that were just and adequate, then it may be conceded, without deciding, that under the evidence the court should have submitted the case to the jury to determine whether the decision of the defendant terminating the contract was justifiable and based upon adequate grounds.

Contracts containing provisions that services shall be performed or an article made or furnished to the satisfaction of the promisor have given rise to much discussion by the courts. But upon an examination of the authorities it will be found that there is a substantial agreement among all of them as to the rules of law applicable. The only disagreement, if any, is as to the application of these rules to all the facts of a particular case, or rather as to how, on the facts, the particular contract should be construed. The law regards the parties as competent to contract that the right of decision as to the satisfactory character of services rendered or of an article furnished shall be absolutely reserved to the party for whom the services are to be rendered or the article is to be made or furnished; and, if the facts are sufficient to show that they did so contract, their stipulation is the law of the case, at least unless there is something in the contract against public policy. Contracts thus construed are generally those involving considerations of feelings, taste, or sentiment; as in the case of a portrait, wearing apparel, or services of a personal nature, where the personality of the one performing them is an important consideration. The very fact that a contract involves considerations of this nature is a strong circumstance tending to show that the absolute right of decision was intended to be reserved to one of the parties. But it is not necessary

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that the contract should be of this kind. It is competent for the parties, if they so will, to make a similar agreement even as to matters only involving operative fitness, value, or mechanical utility of which others are as capable of judging as the party. This court has so held. Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697.

The whole question is one of construction of the contract and the intention of the parties. This is not to be determined exclusively from its mere language, but in determining what the parties meant by that language, or in what sense they used it, it must be construed in the light of the nature, subject, and purpose of the contract. And where courts have construed such a provision as meaning, not that the absolute right of decision was completely reserved to one of the parties, but that he should found his decision upon just and adequate grounds, they have based this construction upon the ground, not that the parties could not so contract, but that, in view of all the facts, they could not have intended to do so, but in incorporating such a provision into their contract they must have understood and adopted it in the latter sense. Where it would be harsh and extremely inequitable to construe the contract as giving one party the absolute and unlimited right of decision—as, for example, where the other party has performed his part of the contract, and the benefits of his performance must necessarily be retained by the promisor—the courts have been quite ready in construing the contract to lay hold of these facts as a reason for holding that the parties could not have meant to give one of the parties the absolute right of decision without being subject to have the grounds of his action inquired into, or their reasonableness and adequacy made the subject of judicial determination.

The provision in this contract was not that it should be left to the defendant whether it should pay for, or what it should pay for, services already performed, but merely the right to terminate the contract so far as it was still executory. Taking all the provisions of the contract together, it, in effect, amounted to nothing more than a contract to employ the plaintiff to perform certain services, at an agreed compensation, only so long as the manner of performance was satisfactory to the defendant. While the services to be

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performed by the plaintiff were not of a personal or confidential nature, yet they were such as to require skill, and especially promptness. The price to be paid for towing, etc. (42 cents per 1,000 feet), was very small, compared with the value of the property. It was subject to the perils of navigation. It appeared that the rafts, after they were made up, would be unprotected from storms when the wind blew from certain directions. Hence the necessity for great promptness in taking them away at the earliest possible moment after they were made up. Under such circumstances nothing was more natural than that the defendant would desire to retain an unqualified right to terminate the contract whenever it became dissatisfied with plaintiff's manner of performing the work, and that it was determined that no one else should have the right to judge for it whether its action was reasonable or justifiable. We are of opinion that, under the circumstances, this is the proper construction of this contract, and just what it must be assumed the parties intended and meant by the language used in it.

It is claimed, however, that, even if this is the proper construction of the contract, yet, in view of its peculiar language ("the services performed"), the time had not arrived when the defendant had a right to exercise its decision, because the plaintiff had not yet performed any services. This is altogether too narrow and technical a construction to be placed on the contract. What it means is that, if the plaintiff did not perform the services to the satisfaction of the defendant, it should have the right to terminate the contract. Dissatisfaction might be based upon the negligence or dilatoriness of the plaintiff in commencing to perform the services as well as upon the character of services already performed. Our conclusion is that the trial court was right in directing a verdict.

Order denying a new trial affirmed.

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EDWARD HANSON and Another v. ASLE SWENSON.

November 13, 1899.

Nos. 11,740—(62).

Administrator's Account—Admission of Evidence.

In an appeal by the heirs of a decedent from an order of the probate court approving and allowing the account of the administrator of the estate of the deceased, in which the only issue was as to the correctness of certain disbursements with which the administrator had credited himself in his account as filed, *held*, that the court erred in admitting in evidence an unsworn statement of the widow of the deceased; also, in admitting evidence for the administrator impeaching his own account, and tending to show that he had never in fact received all the money with which he had charged himself in his account.

From an order of the probate court for Houston county in the matter of the estate of Peter Hanson, deceased, allowing the final account of Asle Swenson, administrator, Edward Hanson and Mary Carr appealed to the district court for said county. In the district court the case was tried before Kingsley, J., who found in favor of the administrator; and from an order denying a motion for a new trial appellants appealed. Reversed.

Duxbury & Duxbury, for appellants.

James O'Brien, for respondent.

MITCHELL, J.

In its history this case is nearly allied to the one between the same parties reported in 77 Minn. 70, to which reference is made for the facts so far as they are common to both cases. In January, 1871, a few months before the respondent was appointed guardian of the appellants, he was also appointed administrator de bonis non of the estate of their deceased father, Peter Hanson. The former case was an appeal from the allowance of respondent's account as guardian, while this is an appeal from an allowance of his account as administrator.

In June, 1898, the probate court, upon the petition of the appellants, issued to respondent an order to show cause why he should

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not render and settle his account as administrator. In response to this citation, he filed an answer, alleging, among other things,

"That the cause of action out of which, or under color of which, the right to this citation, or the remedies * * * sought to be obtained, did not accrue within 25 years * * * and that the same is stale, and * * * barred by the statute of limitations, as well as by the established rules of equity."

The probate court made no ruling upon this except to require the respondent to file his account, stating that, when that was done, he would pass upon the whole matter. Thereupon the respondent filed his account, purporting to state in detail all his receipts and disbursements as administrator during the continuance of his trust. Upon a hearing as to the allowance of this account the appellants objected to three items of alleged disbursements with which the respondent had credited himself. These were the only objections interposed. The probate court overruled these objections, and approved and allowed the account as filed. From this order the appellants here appealed to the district court.

When the appeal came on for hearing in the district court, it was expressly stated and agreed that there was no dispute as to the amounts or items of property or money which had come into the hands of the administrator; that all of them, including the item of $1,200 received from the sale of real estate, were correctly stated in the account filed; that there was no dispute as to the items of disbursements with which the administrator had credited himself in the account except the three to which objections had been interposed in the probate court. The court then announced that the only issues in the case were as to these three items, and with this understanding the parties proceeded to introduce their evidence. The subsequent trial of the case was conducted so irregularly, and in such disregard of the issues and the rules of evidence, that it will not be surprising if it shall be found that the learned trial judge himself was led into error. The evidence offered and permitted to be introduced by the administrator roamed over the entire field of his receipts and disbursements during his entire administratorship, in utter disregard of his account filed, and to the extent of

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attempting to prove disbursements not contained in the account, and even of attempting to prove that he had never received some of the money with which he had charged himself, and acknowledged he had received, in his account. Most of this evidence was of the most confused and indefinite character, and was not calculated to prove anything satisfactorily except that, because of old age, lapse of time, or a loose manner of doing business, the respondent had very little recollection of the facts, and that his account filed must have been made up with very little regard to the actual facts.

The court made no finding as to the correctness of the account filed, or as to the three items to which objections were interposed, but found that the respondent had only collected a part of the $1,200 with which he had charged himself in his account as received from the sale of land, and that he had neglected to collect the balance, but that he had paid out the whole of the part which he had collected for expense of administration and on claims allowed against the estate (it is very doubtful whether there is any evidence to support this); and as a conclusion of law held that

"The appellants, by failing for more than 15 years since they arrived at their majority to call the respondent to an accounting concerning the uncollected balance of $355 on his sale of said real estate, have been guilty of such laches as to bar a recovery," and for that reason the order of the probate court (approving and allowing the account as filed) should be affirmed.

While much immaterial and incompetent evidence was introduced, we discover nothing in the record tending to show that the issue of laches was voluntarily litigated by the parties. It was entirely outside of the issue in the case, which was the correctness of three specific items in the respondent's account, filed by himself. The question on trial before the court was, not whether the administrator should be required to render an account, but whether the one he had rendered was correct. Having made these general statements as to the history and status of the case, we come now to the consideration of the specific errors committed on the trial, for which, if no others, a new trial must be granted.

1. Upon the trial the respondent was permitted, over the objection and exception of the appellants, to introduce in evidence the

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unsworn written statement of the former wife and widow of Peter Hanson to the effect that she had received from the respondent all the money and property which he ever had collected or received from the sale of the estate or otherwise; that the full share of her children in the estate of their father was paid by the respondent for their support to her and her second husband, with whom they resided until they attained their majority; and that respondent had fully paid over and accounted for all moneys and property that ever came into his hands as administrator. That the admission of this evidence was error is too clear to admit of discussion.

2. The respondent was also permitted, over appellants' objection and exception, to introduce evidence to impeach his own account by showing that he had never in fact received the whole of the $1,200 from the sale of real estate which he had acknowledged receiving, and had charged himself in the account filed. If any error had been inadvertently made in stating the account, we think the court might, on a proper showing, allow it to be amended, as it might allow an amendment to a pleading. But in the absence of any such amendment, and in view of the fact that the sole issue in the case, as agreed to by both parties before the trial, was as to three specific items in respondent's account of disbursements, the evidence was clearly inadmissible.

Order reversed, and a new trial granted.

LEONARD W. GAMMONS v. G. GULBRANSON.

November 13, 1899.

Nos. 11,748—(116).

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Attorney at Law—Barratry.

Held, following Gammons v. Johnson, 76 Minn. 76, that a general scheme to work up and instigate litigation in the names of persons and concerning subjects to whom and to which the parties to the scheme were entire strangers, and in which they had no interest except a speculative one in the pecuniary profit which they might derive from the litigation which they have instigated, is barratrous, and against public policy.

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Same—Services—Quantum Meruit.

A party to such an illegal scheme will not be permitted to obtain the benefit of the litigation which he thus instigated by abandoning the original express contract and suing on a quantum meruit for services rendered in the litigation.

Same.

It is not material at what time a person becomes a party to such an illegal scheme. If he becomes a party to it at any stage of its execution, he will, in contemplation of law, be deemed to have been a party to it from its inception.

Same—Evidence.

The evidence is conclusive that plaintiff, if not a party to such a scheme at its inception, subsequently became such.

Action in the district court for Otter Tail county to recover $50 for services as attorney at law. The case was tried before Baxter, J., and a jury, which rendered a verdict in favor of plaintiff for $39.08; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

J. W. Mason, for appellant.

L. W. Gammons, pro se.

MITCHELL, J.

This action was brought by plaintiff to recover for his services as an attorney at law in a suit brought by the defendant against the Great Northern Railway Company to recover damages for its failure to fence its road through defendant's farm. The complaint is so drawn as to admit of a recovery either under a written contract between plaintiff and defendant, executed May 14, 1896, or, that failing, upon a quantum meruit. The written contract was, in all its material provisions, substantially the same as the one considered by this court in Huber v. Johnson, 68 Minn. 74, 70 N. W. 806.

The defendant set up in his answer, and on the trial introduced evidence to prove, substantially the same facts which were alleged and offered to be proved by the defendant in Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035, to wit, that the suit against the Great Northern Railway Company was the result of an illegal and bar-

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ratrous conspiracy and scheme entered into between plaintiff and one Huber to work up and instigate wholesale vexatious litigation in the names of parties and concerning subjects to whom and to which they were entire strangers, and in which they had no interest except a speculative one in the pecuniary profit which they might derive from the litigation which they had thus instigated; also that the subsequent contract between plaintiff and defendant set up in the complaint was merely in continuation and furtherance of the original unlawful scheme of plaintiff and Huber. Without objection by either party, the court instructed the jury, as a matter of law, that the original contract between Huber and the defendant was void, as being champertous, and against public policy. In view of the defense set up in the answer, this instruction must have been given under the doctrine of Gammons v. Johnson, supra, and the sufficiency of the evidence to justify the instruction is not questioned.

The court further instructed the jury that, if plaintiff was a party to, or connected with, that illegal scheme, he could not recover in this action. This instruction was not only not excepted to, but was good law; for, as was said in Gammons v. Johnson, supra, where the illegality of the conduct of a party enters into the very inception of a scheme by which the litigation itself is illegally instigated, even if the illegal express contract is set aside or ignored, this original vice in the scheme still exists; and a party to it cannot purge his conduct, and obtain the benefit of the litigation which he has thus unlawfully instigated, by ignoring the original special contract, and suing on a quantum meruit. Neither could he accomplish that result by attempting to abandon the original contract, and make a new one in furtherance of the unlawful scheme. Nor would it make any difference when a person became a party to such an illegal scheme. If he became a party to it at any stage of its execution, he would, in contemplation of law, be a party to it from its inception. Hence the only question submitted to the jury (without objection by either party) was whether plaintiff was a party to, or connected with, this illegal "Huber scheme," so called. The verdict being for the plaintiff, the jury must have found in the

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negative; and the only question on this appeal is whether the evidence justified the verdict.

After very careful consideration the majority of the court are of opinion that the evidence was conclusive against the verdict. The plaintiff testified, in substance, that he was not a party to the procuring of these Huber contracts. As already suggested, this, even if true, would not be material if he subsequently became a party to the illegal scheme. The admitted or undisputed facts and circumstances are overwhelmingly against the plaintiff. He admits that Huber brought to him 71 of these contracts, all alike except the names of the parties of the second part, for the purpose of his bringing suits on them; that he had never seen any of these 71 parties, or had any previous communication with them; that his employment was with Huber, "seeming to act as their agent." Under this employment he brought 71 suits, using, in part at least, printed blank complaints which he had previously used in similar suits in another part of the state. His arrangement with Huber was that he was to have, as contingent fees, half of the contingent fees which Huber was to receive, which was 50 per cent. of the amounts recovered. These Huber contracts were apparently on printed blanks. The claims or causes of action, if any, of these 71 parties of the second part, were in no way connected with each other. Each party had his own separate and independent claim. The character of the parties, and the distance of their respective farms from each other, tended very strongly to negative the idea that there was any concert of action between them to prosecute their claims against the railroad company.

It is impossible to conceive that, under these circumstances, an experienced attorney could fail to understand that these contracts were the result of a systematic scheme on the part of Huber to work up and instigate wholesale litigation for mere speculative purposes. After the decisions of this court in Huber v. Johnson, supra, and Gammons v. Johnson, supra, and evidently because of them, the plaintiff, so far as he could, obtained new contracts from these 71 parties running to himself instead of Huber, and so nearly identical, both in terms and language, with the Huber contracts, as to indicate that the same printed blanks were used in both. The very

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terms of these new contracts show that they were, and must have been intended to be, mere substitutes for the original Huber contracts. Huber himself was a party to this substitution; if not actively participating in it, at least consenting to it. It was evidently fully understood and agreed upon by both plaintiff and Huber. The same person who had acted as agent to procure the original contracts running to Huber was employed as agent to procure the new contracts running to plaintiff. Other facts and circumstances might be referred to, but what has been stated is, in our opinion, sufficient to show conclusively that plaintiff was cognizant of and a party to the Huber scheme, at least from the time that Huber brought the contracts to him for the purpose of having suits brought.

The order appealed from is reversed, and the cause remanded to the court below, with directions to order judgment in favor of the defendant notwithstanding the verdict.

START, C. J.

The general principles of law and ethics laid down in the majority opinion are correct and salutary, and they ought to be vigorously enforced in practice. I concede that the preponderance of the evidence on the issue submitted to the jury was in favor of the defendant, but I dissent from the proposition that it was, as a matter of law, conclusive.

BUCK, J. (dissenting).

I dissent. There is nothing in this case to show that the jury were in any manner swayed or influenced, in rendering their verdict, by prejudice, passion, or any improper motive. A fair trial was had. The jury found a verdict in favor of plaintiff, and the trial judge refused to grant a new trial, thus adding his own judgment to the verdict of the jury that the weight of evidence was on the side of the plaintiff, Gammons. The latter testified that he had nothing to do with the champertous contract involved in the action, and no impeaching testimony was introduced as to his reputation for truth and veracity. At most, the evidence was conflicting, but the majority opinion utterly ignores the familiar rule that in such case great weight should be given the opinion of the trial court in weigh-

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ing the evidence and passing upon the weight of evidence. I think that the decision of the majority practically results in a trial of the facts by this court instead of the jury. But this appellate court has no such right, and should not weigh the evidence where there is a substantial conflict, and especially it should not disturb the order of the lower court in refusing a new trial in this case. The functions of the two courts in this respect are well understood. The trial court may weigh the conflicting evidence; the appellate court may not do so, in the ordinary meaning of that word. It is only when the evidence is so conclusively or manifestly and palpably one way or the other that the appellate tribunal is justified in interfering. In my opinion, this is not such a case, and I think the verdict of the jury should stand.

Champerty and barratry are serious charges to make against an attorney of this court; and where he positively denies such charges, and in that denial is sustained by a jury of his country and the opinion of the trial court, after a full and fair trial, I am not willing, upon such evidence as appears in this case, to yield my assent to the conclusion arrived at in the majority opinion. Highly as I disapprove of acts of champerty and barratry, I feel that an attorney ought not to suffer from the injustice implied in the reversal of this verdict upon the grounds stated, hence I think that the order of the trial court should be affirmed. See Foot v. Mississippi & R. R. Boom Co., 70 Minn. 57, 72 N. W. 732, in which it was held that, where some evidence supports a finding it will not be disturbed, though the evidence as a whole preponderates against it. And in Moran v. Small, 68 Minn. 101, 70 N. W. 850, it was held that findings of fact not against the overwhelming weight of evidence will not be disturbed.

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HERBERT L. HAYDEN v. JOHN M. BYRON.

November 13, 1899.

Nos. 11,757—(58).

Contract—Acceptance of Offer by Letter.

A letter written by the defendant construed as an unconditional and perfect acceptance of plaintiff's offer to sell personal property.

Action in the district court for Dodge county to recover the purchase price of a set of abstract of title books. The case was tried before Buckham, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

Herbert L. Hayden, pro se.

P. McGovern, for respondent.

MITCHELL, J.

The plaintiff, a resident of Madison, Lac Qui Parle county, was the owner of a set of abstract of title books of that county. "Several days" prior to June 29, 1897 (the exact day does not appear), the defendant, a resident of Waseca, went to Madison to negotiate with the plaintiff for the purchase of the books. Plaintiff offered to sell them to the defendant for $700 cash on delivery. The trial court found that

"As the result of such negotiation the plaintiff and defendant then and there agreed that the defendant should return to Waseca, and within a few days write whether or not he would purchase the books at that price, and that, if he decided to do so, he should at once send plaintiff a draft for such sum, or return to Madison within a week and pay the same."

On June 29 defendant wrote to plaintiff:

"I will take the abstracts at $700. Will write later, or be up there [at Madison] next week."

Nothing further was done in the matter until July 28, when defendant wrote to the plaintiff:

"Things have shaped themselves so that it is impossible for me to take the abstracts. I cannot get the money together."

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The foregoing is all that has ever been done in reference to the sale. The plaintiff has always been ready and willing to deliver the books on payment of the $700. He brought this action to recover that amount, as the purchase price of the books. The trial judge decided that the plaintiff could not recover on the ground as indicated by his memorandum; that defendant's letter of June 29, in view of the latter part of it, was a qualified and imperfect, and not an unconditional and perfect, acceptance of plaintiff's offer as made, and constituted in legal effect a refusal of plaintiff's offer, and a new proposal which was withdrawn before acceptance. The plaintiff challenges the court's finding of fact, as not justified by the evidence; and also the conclusion of law, as not supported by the findings of fact.

The defendant does not seem to dispute the proposition that, if his letter of June 29 constituted a perfect and unconditional acceptance of plaintiff's offer, the transaction constituted an executed contract of sale of the books in question, by which the title to the property passed to the defendant, although he could not have taken it away without paying the price. Upon the facts, this would at least be the presumption in the absence of any evidence or finding of a contrary intention. If so, then plaintiff might elect to treat the books as the property of the defendant, and sue on the contract for the purchase money. We do not think that there is any evidence to support the finding of the court that if defendant decided to take the books, and decided to pay for them by draft, he was to send the draft "at once," which we construe as meaning contemporaneously with the notice of acceptance. All the terms of the contract were agreed on, if defendant decided to accept plaintiff's offer. All the finding that the evidence will justify is that the defendant was to notify the plaintiff within a week, or perhaps a little more, whether he would take the books at that price; that, if he decided to take them, he should pay for them either in money in person at Madison (in which case the books were to be contemporaneously delivered to him), or by draft remitted to plaintiff at Madison (in which case the books were to be left for him in plaintiff's vault until defendant came there for them).

Construing thus the terms of plaintiff's offer, we are unable to see

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anything conditional or imperfect in the defendant's letter of acceptance. The first part of it, standing alone, would certainly constitute a perfect and unconditional acceptance. There is nothing in the latter part which affixes any condition to the acceptance, or requests any modification or change of the offer. On the contrary, it is entirely consistent with an unconditional acceptance of the offer as made. To say, "Will write later, or be up there next week," would, under the circumstances, naturally mean, or at least be entirely consistent with the meaning, that he would write and send the draft, or go to Madison and pay the money in person, and get the books, next week, in exact accordance with plaintiff's offer. There is nothing in the letter to indicate that one or the other of these things would not be done within a week from the time the offer was made. It was not necessary, in order to constitute an unconditional acceptance, that defendant should repeat in his letter all the terms of the offer, in detail.

Order reversed, and a new trial granted.

WILLIAM DEERING v. SILAS M. POSTON.

November 13, 1899.

Nos. 11,763—(84).

Action upon Judgment—Want of Jurisdiction—Pleading.

When, in action upon a judgment, the defendant seeks by way of counterclaim or equitable defense to have the judgment, valid on its face, cancelled and adjudged void, on the ground that the court rendering it never acquired jurisdiction of his person, the answer must state all the facts necessary to constitute a good complaint in an action brought to have the judgment canceled and declared void on the same ground. The answer in this case considered, and *held*, under this rule, not to state a counterclaim or defense.

Action in the district court for Wilkin county to recover $497.45 on a judgment. The case was tried before C. L. Brown, J., and a jury, which rendered a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

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Chas. S. Marden, for appellant.

Lyman B. Everdell, for respondent.

MITCHELL, J.

This action was brought May 7, 1898, on a judgment in favor of the plaintiff and against the defendant, alleged to have been duly rendered by the district court of Hennepin county on May 9, 1888, in an action then pending in that court. The answer, as finally amended on the trial, was: (1) A general denial of each and every allegation of the complaint;

(2) "As a counterclaim, defendant specifically denies that any summons in the action described in said complaint was ever served upon him, and that the said district court of Hennepin county ever had jurisdiction of his person in said action";

And (3) a demand that this action be dismissed upon its merits, and that he recover his costs and disbursements therein. To this so-called "counterclaim" plaintiff interposed a reply consisting of a general denial. Upon the trial the defendant was permitted, over plaintiff's objection and exception, to introduce the testimony of himself and wife tending to prove that no summons in the action in the district court in Hennepin county was ever served upon him. One of the objections interposed to this evidence was that it was inadmissible under the pleadings.

This court has held that an action may be maintained to set aside a judgment valid on its face on the ground that the summons was never served on the defendant; that such an action is a direct, and not a collateral, attack upon the judgment. Also, that in an action on the judgment the defendant may, by way of counterclaim and equitable defense, set up facts which would justify a court in canceling the judgment on the ground that the court rendering it never acquired jurisdiction of his person. Vaule v. Miller, 69 Minn. 440, 72 N. W. 452. But, to constitute a good pleading in such a case, the answer must state all the facts necessary to constitute a good complaint in an action brought by the defendant to have the judgment canceled and set aside on the same ground.

The rule is that, where objection to the sufficiency of a pleading is raised for the first time on the trial by way of objection to the

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admission of evidence, it should be very liberally construed, and sustained if sufficient facts to constitute a cause of action or a defense can be inferred by any reasonable intendment from its allegations. But, even under this very liberal rule, it seems to us impossible to hold that the second subdivision of this answer states facts sufficient to constitute a cause of action, counterclaim, or defense. If defendant had brought an action to cancel and set aside this judgment, and had alleged in his complaint nothing but what he has alleged in this part of his answer, it certainly could not be successfully maintained that the complaint stated a cause of action. If the evidence could be resorted to to help out the answer, it is possible that the pleading could be sustained. But this is not permissible. The general denial of the allegations of the complaint contained in the first subdivision of the answer does not aid the pleading in this regard. The defendant's counsel himself admits this.

Order reversed, and a new trial granted.

HENRY H. RUNYON v. FRED ALTON and Others.

November 13, 1899.

Nos. 11,772—(44).

Highway—Service of Notice of Appeal from Order.

A notice of appeal from an order of the supervisors of a town laying out a highway was served on the town clerk without any request to him to file it in his office, or any statement as to the purpose for which it was served upon or given to him, and the notice was never in fact filed by him in his office. *Held*, that this did not constitute a filing of the notice in the town clerk's office, as required by Laws 1895, c. 54.

Appeal by Henry H. Runyon from an order of the district court for Martin county, Quinn, J., dismissing an appeal from an order of Fred Alton and others as supervisors of the town of Tenhassen laying out a highway through appellant's land. Affirmed.

Voreis & Mathwig, for appellant.

H. H. Dunn, for respondents.

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MITCHELL, J.

This is an appeal from an order of the district court dismissing the appeal of the plaintiff from an order of the supervisors of the township of Tenhassen laying out a highway.

The ground upon which the district court dismissed the appeal was that no notice of appeal had ever been filed in the office of the town clerk, as required by Laws 1895, c. 54. The copy of the notice of appeal filed in the office of the clerk of the district court on May 31, 1898, had attached to it the affidavit of one John P. Runyon that on the 27th of the same month, in said township, he "served the within notice upon Louis Meyer, town clerk of said township, by then and there handing to and delivering a copy thereof to him personally." In the same affidavit he swore that he had made like service on the chairman of supervisors of the town. In support of their motion to dismiss, the respondents presented the affidavit of Meyer that about May 25, 1898, he was called outside of his residence, and while so outside the notice of appeal was handed to him; that no request was made to file the same, and no fee paid or tendered to him for filing; that the notice was never filed by him in his office, and that no notice of appeal, or copy thereof, was ever filed or left in his office for filing. Thereupon, and in December, 1898, the plaintiff procured and presented a second affidavit of John P. Runyon, to the effect that when he served the copy of the notice of appeal upon Meyer he requested him to file it in his office, and that Meyer stated to him that he would so file it. It was upon this showing that the court dismissed the appeal.

Wherein the affidavits conflict, the court must be assumed to have found the facts in favor of the respondents, to wit, that the notice of appeal was handed to the town clerk, outside of his residence, without any request that it should be filed in his office, or any statement as to the purpose for which it was delivered, and without any fee for filing being paid or tendered, and that it was never in fact filed by the town clerk. That this was true is corroborated by the facts that John P. Runyon deemed it necessary to make an affidavit of service, and in that affidavit, made at the time when the facts were fresh in his mind, made no mention of filing, or of any request to the town clerk to file, the notice. He apparently misunderstood the

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provisions of the act of 1895, and supposed that what was required was a service of the notice upon the town clerk, and not the filing of it in his office. It is impossible, under the most liberal rule, to hold that the facts, as we assume them to have been found by the court, constituted a filing of the notice in the town clerk's office. As applied to a town clerk, who usually keeps official documents in his residence or place of business, and has no particular room known or designated as the "town clerk's office," we attach no controlling importance to the place where the notice was handed to Meyer. And we are also of opinion that if the document was handed to him, accompanied by a request to him to file it, and he had promised to do so, without demanding payment of his fee, he would be deemed to have waived the fee. But here the facts were, as we must assume, that the notice was served on the town clerk by merely handing him a copy of it, without any request to file it, or any statement as to the purpose for which it was handed to him, and that he never did in fact file it.

Order affirmed.

THEODOR GULICKSON v. W. J. BODKIN.

November 13, 1899.

Nos. 11,777—(80).

Judgment—Collateral Attack—Presumption of Jurisdiction.

Rule reaffirmed that, where the validity of a domestic judgment is collaterally attacked on the ground of the want of jurisdiction of the court, jurisdiction is conclusively presumed unless the contrary affirmatively appears on the face of the record itself, and that this rule obtains where the record is silent upon the jurisdictional facts as well as when it affirmatively states or recites them.

Same.

The mere absence from the judgment roll of papers which ought to have been included, and which, if included, would affirmatively show that the court had jurisdiction, is not enough to "make it affirmatively appear from the face of the record that the court had no jurisdiction."

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Action in the district court for Clay county against defendant as sheriff of said county to recover possession of two barrels of whiskey, or the sum of $159.10, the value thereof, in case a delivery could not be had, and $25 damages for the detention. The case was tried before Baxter, J., who directed a verdict in favor of defendant; and from a judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

C. A. Nye, for appellant.

F. H. Peterson, for respondent.

MITCHELL, J.

This was an action of claim and delivery. It is admitted that the plaintiff, who derived his title from one Olson, was the general owner of the property, and entitled to the possession, unless the defendant, as sheriff, had a prior special property by virtue of a levy under an execution issued out of the district court upon a judgment in favor of one Palacek and against Olson. The regularity of the execution on its face, and the fact that the levy on the property antedated its sale by Olson to plaintiff, are not questioned.

The contention of the plaintiff is that the judgment of the district court upon which the execution was issued was absolutely void because of the want of jurisdiction of the court to render it. The action of Palacek against Olson was originally brought in justice's court, and was appealed, or attempted to be appealed, by the defendant, to the district court. Olson failed to appear, or enter the appeal on the calendar for trial, as required by statute; whereupon the plaintiff, Palacek, entered it, and upon his motion the court ordered judgment against the appellant, Olson, for the amount of the judgment of the justice, and costs of both courts, as provided by G. S. 1894, § 5072.

The sole point urged by the defendant here is that the district court had no jurisdiction to enter any such judgment, because there had never been any valid appeal of the action to that court. The only evidence introduced or offered by the defendant to sustain this contention was the "judgment roll" in the district court in the action of Palacek against Olson, in connection with a stipulation of the parties that the records in this case "were the identical

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records upon which this execution was issued." This "judgment roll" consisted of copies of the notice of appeal to the district court, certain docket entries of the justice (which are silent on the subject of appeal), notice of taxation of costs, and the judgment. Both the order for judgment and the judgment recited that the defendant Olson had appealed to the district court. This was all the evidence introduced or offered bearing on the question of the validity of the judgment.

Plaintiff's line of argument is that, because this judgment roll does not contain the papers necessary to constitute an effectual appeal to the district court,—particularly an affidavit on appeal,—therefore it appears affirmatively that there was no appeal, hence, on the face of the record, the judgment is absolutely void. Conceding, without deciding, that, if it affirmatively appeared on the face of the record that there never was any sufficient appeal, the judgment would be absolutely void, even as against a collateral attack, still no such fact affirmatively appears from the judgment roll introduced in evidence. It has been repeatedly held by this court that, when the validity of a domestic judgment is sought to be attacked collaterally on the ground of want of jurisdiction, the jurisdiction is to be conclusively presumed, unless the contrary affirmatively appears on the face of the record itself; that this presumption obtains when the record is silent upon the jurisdictional fact, as well as where it affirmatively states or recites it. The want of jurisdiction does not affirmatively appear on the face of the record in this case. The mere absence from the judgment roll of certain papers which ought to have been made a part of it, and which, if included, would affirmatively show that jurisdiction had been acquired, is not enough to make it "affirmatively appear from the face of the record that the court had no jurisdiction." In aid of his case, counsel for the plaintiff relies upon and invokes the stipulation, already referred to, to the effect that these were the records upon which the execution was issued. We discover nothing in this that at all affects the case.

Judgment affirmed.

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TOWN OF CORDOVA v. VILLAGE OF LE SUEUR CENTER.

November 13, 1899.

Nos. 11,916—(68).

Support of Poor—Application for Town Aid.

In an action to recover for expenditures made by the plaintiff town for the support of a pauper whose legal settlement was in the defendant village, *held*, that the fact that the application to the town for aid was not under the oath of two credible persons, as provided by Sp. Laws 1881 (Ex. Sess.) c. 221, is no defense to the action.

Change of Residence—Settlement—Meaning of "Pauper."

Where a person having a legal settlement in one town removes to another town or village, he may acquire a new settlement in the latter, although at the time of his removal, and thereafter, he was not self-supporting, but was aided or supported by private charity,—at least, provided he has never received public aid from the town of his former settlement.

Action in the district court for Le Sueur county to recover $427.68 and interest for the support of two paupers. The case was tried before Cadwell, J., who directed a verdict for $409.35 in favor of plaintiff; and from a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Charles C. Kolars, for appellant.

G. S. Ives and *M. R. Everett*, for respondent.

MITCHELL, J.

One Campbell and his wife having applied to plaintiff for public support, the supervisors, being of the opinion that the applicants had no legal settlement in their town, but had such settlement in defendant village, caused the applicants to be conveyed to the village. The village authorities refused to receive or aid them, and caused them to be returned to the town, and notified the town supervisors that the village refused to relieve or support them. Thereafter the town was compelled to, and did, expend a considerable sum of money for the relief and support of the Campbells, and this action was brought to recover the amount from the village. Upon the close of the evidence the court directed a verdict for the plaintiff. Upon this appeal the village makes two points only:

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1. The first is that the court erred in admitting in evidence the application of the Campbells to the board of town supervisors for aid, because it was not under oath of two credible persons, as provided by Sp. Laws 1881 (Ex. Sess.) c. 221, § 2. This provision was evidently designed for the protection of the supervisors who are called upon to furnish aid, and perhaps, also, as a precautionary measure to protect the town against unfounded applications. But it could never have been intended as a jurisdictional prerequisite to the authority of the supervisors to grant public aid. If so, an applicant for aid, who for any reason was unable to procure the required oaths, might perish under the very eyes of the town authorities. The only effect, in our judgment, of granting aid without such oaths, would be that the supervisors would act at their peril, and, if their action was questioned, the burden would be on them to prove that the case was in fact a proper one for giving public relief. The propriety and necessity, in fact, of granting relief in this case are not questioned.

2. For the purpose of proving that the Campbells had never acquired a legal settlement in the village, the defendant offered certain evidence tending to prove, as is claimed, that at the time the Campbells came into the village to reside, and ever afterwards, they were not self-supporting, but were supported by the private charity of a friend; it being claimed that the law is that a pauper cannot by a change of residence acquire a new settlement, under the poor laws.

We have no such provision in our statutes. The only provision of which we are aware on the subject of legal residence or settlement under our laws for the relief of the poor is G. S. 1894, § 1954. Assuming that the common law (if there is any common-law rule on the subject) is that a pauper cannot, by changing his place of residence, acquire a new residence or settlement, within the meaning of the poor laws, and that this rule is not changed or affected by section 1954, supra, still the term "pauper," in that connection, must be construed as meaning only persons receiving aid and assistance from the public under the provisions made by law for the support and maintenance of the poor. In legislation the word has long since acquired this precise and technical meaning. See Opin-

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ion of Judges of Supreme Court, 11 Pick. 537. While in England and New England this matter of the legal settlement of paupers is very fully and specifically covered by express statutes, we have not found a statute or a decision which makes the settlement turn upon the question whether the person was in fact poor, or was aided by the private charity of friends or others. But, in every instance where the question was whether a person had acquired a new settlement by a change of residence, it was made to depend upon the fact whether at the time of his removal he was receiving public aid from the town from which he removed, or had subsequently received it. See Inhabitants of Oakham v. Inhabitants of Sutton, 13 Metc. (Mass.) 192, and cases cited.

The usual method provided for protecting towns against persons not yet technically paupers, but liable to become such, from gaining a legal settlement, is by warning them to depart, and, if they fail to depart, by deporting them to the towns from which they removed. Our statute does not seem to give a county or town any authority to move in that direction until the person applies for public aid. But that is a matter for the legislature. And inasmuch as a person must reside a full year in a county or town in order to acquire a legal settlement under our statute, if his pauperism is at all imminent at the time of his removal, in the vast majority of cases the application for his support or relief will be made before he acquires a settlement. Hence counties and towns are not left so unprotected against the immigration or importation of prospective paupers as defendant's counsel assumes. If the question of legal settlement is left to be determined upon oral evidence as to a person's actual financial circumstances, and whether he was wholly self-supporting, or had been assisted by friends or others at the time of or prior to his change of residence, municipalities would be left without any definite and certain rule by which they could conveniently and promptly ascertain the legal settlement of an applicant for aid. The only authority cited by defendant's counsel is Town of Saukville v. Town of Grafton, 68 Wis. 192, 31 N. W. 719. There are some expressions in the opinion in that case which might seem to favor counsel's contention, but when the facts are examined it will be found that nothing decided

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supports defendant's contention. Moreover, that case involved the construction of an express statute on the subject. There was no error in excluding the evidence.

Judgment affirmed.

ST. PAUL GASLIGHT COMPANY v. CITY OF ST. PAUL.

November 14, 1899.

Nos. 11,741—(119).

City of St. Paul—Interest upon Cost of Street Gas Lamps.

Held, under the charter of the St. Paul Gaslight Company (Laws 1856, c. 53), the city of St. Paul is not compelled to pay the gaslight company compensation for street gas lamps which the city is not using to light its streets, and is not by any contract required to continue to use.

Action in the district court for Ramsey county to recover a balance of $1,426.46, together with interest thereon, for interest at the rate of eight per cent. per annum on the cost of gas posts and lamps erected by plaintiff at various times prior to January 1, 1897, in the streets of defendant city in compliance with resolutions of its board of aldermen and common council under the provisions of plaintiff's charter. The case was tried before Bunn, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant appealed. Reversed.

James E. Markham, for appellant.

F. W. M. Cutcheon, for respondent.

CANTY, J.

The question involved in this case is whether the St. Paul Gaslight Company is entitled to compensation for street gas lamps, lamp posts, connecting pipes, and gas meters remaining in the streets of St. Paul, which the city ordered the gaslight company to erect, and which, on being so erected, the city used for a time, but is not now using. The charter of the gaslight company provides that it shall furnish and lay these and keep them in repair at its own expense, and that the city shall pay to the gas company, as compensation therefor,

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"An interest of eight per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same."

There is no express provision as to how long the city shall pay such compensation, or whether it shall pay the same after it has ceased to use the street lamps, and the question must be decided by the interpretation of several provisions of the charter. The gaslight company was incorporated by Laws 1856, c. 53. The act took effect January 1, 1857, and provides that at the end of 20 years the city shall have the privilege of buying the gas plant, but, if the city shall at that time decline to do so, it may exercise a like option at the end of 20 years more,

"But should the said city not resolve to purchase at either of the times provided herein, then this act shall be in full force for an additional term of ten years from and after the last date mentioned for such sale and purchase and no longer."

The city did not exercise its option at the end of either 20-year period, and so the charter of the gaslight company will continue to January 1, 1907, a period of 50 years. The charter contains the following provisions:

"Sec. 9. That it shall be the duty of the St. Paul Gas Light Company to prosecute the works necessary to the lighting the whole city of St. Paul and suburbs with gas, and to lay their pipes in every and all directions, whenever the board of directors shall be satisfied that the expenses thereon shall be counterbalanced by the income accruing from the sales of gas. It shall also be their duty to put the gas works into successful operation as soon as practicable: provided, that whenever the corporation of the city of St. Paul shall, by resolution of the board of aldermen, direct lamps to be erected and lighted in the streets of the city, the company shall make contract therefor, and furnish and provide, lay, set up and keep in good repair, at their own proper expense and charge, the street posts and lamps, and their pipes and meters, all to be of the best quality of work and material now in use. In consideration whereof, the said corporation of the city shall pay quarterly to the St. Paul Gas Light Company, an interest of eight per cent. per annum on the amount of the sum of the original cost of said street lamps and lamp posts, gas meters and gas pipes, and the cost of laying and erecting the same. But said company shall not be bound to lay every pipe in such places where the proceeds from

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the sale of gas light would not be sufficient to defray the expenses of furnishing the same."

"Sec. 14. The corporation of the city of St. Paul and the board of directors of the St. Paul Gas Light Company may contract for and make regulations relating to the lighting of said city with gas, in such manner as may be agreed upon, and they may make generally such contracts in relation to the business of the company as may be beneficial to them and the public."

These are all of the provisions of the charter which we deem it necessary to consider. It will be observed that the clause first above quoted is found in section 9. The charter provides no way in which the city can procure gas to light its streets, except that provided by section 14, under which the city must make a contract, voluntarily entered into by both parties, in order to procure gas for that purpose. The city and the gas company have made such contracts from time to time; some of the contracts covering a period of five years each, and others a period of only one year each. Many things might have occurred which would make it proper that the city should abandon the use of gas for street-lighting purposes in the whole or a particular part of the city. For instance, a suburb of the city within the corporate limits might have been supported by some large factory or other industry which was discontinued, and that part of the city might for that reason have gone to decay, and its population become so reduced as to render it proper and expedient to cease lighting its streets, or such suburb might have been destroyed by fire and never have been rebuilt. Again, it might have become necessary to substitute electricity for gas in lighting the city or a part of it.

It seems to us that it would be unreasonable to hold that if, at the inception of the 50 years which this charter was to run, the city had ordered such street lamps to be erected, had used them 10 years under a contract for lighting the streets, which expired at the end of that time, and then, on account of some such contingency, had ceased to light the streets with gas, the city would be bound to pay such compensation for maintaining and keeping in repair the street lamps, lamp posts, connecting pipes and meters for 40 years more, and to permit them to incumber the streets for that length of time, although the city had not a particle of use for

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such street lamps during all of that time. Again, it would be unreasonable to hold that the city council might, under section 9, compel the gas company to erect street lamps, and then, after using them a month or a year, abandon the use of gas for street-lighting purposes, and thereby avoid all liability to pay any other compensation for the erection and use of the street lamps than eight per cent. per annum during such use on the cost of erecting the same.

But we are of the opinion that section 9 does not give the council the right in its discretion to compel the erection of street lamps, regardless of how long the city may use them, and without protecting the gas company by stipulating a length of time during which the city shall use them. Section 9 provides that, whenever the city shall "by resolution of the board of aldermen direct lamps to be erected and lighted in the streets of the city," the gas company shall erect the same and keep them in repair. But, as we have seen, the city has no power under the charter to compel the streets to be lighted, except by making for that purpose a contract, voluntary as to both parties. When making such a contract, the gas company can refuse to contract for lighting any street lamps except those already erected, and, before the city can compel the erection of more lamps, it must first make a contract for lighting them. In making such contract, the gas company can protect itself by insisting that such contract for lighting such new lamps shall cover a period of time of sufficient length that the eight per cent. per annum to be paid during that time will remunerate the gas company for erecting the lamps.

We are of the opinion that under these circumstances the charter does not require the city to pay such compensation for street lamps which it is not under any contract to use. This, in our opinion, is the more reasonable and proper construction of the provision of the charter, and the one which should be adopted. We therefore hold that the city is not liable for such compensation for street lamps after it has ceased the use of the same, and abandoned the use of gas in lighting its streets.

The claim of respondent that there has been by both parties a practical construction of the charter which binds the city to pay such compensation for street lamps which it is not using, is unten-

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able. Neither can we hold that any of the contracts made between the parties under section 14 bind the city to pay such compensation for street lamps not in use.

The judgment is reversed, and a new trial granted.

On November 27, 1899, the following order was made:

PER CURIAM.

Upon the stipulation of the parties hereto in open court it is ordered that the order heretofore made herein be, and it is hereby, modified so as to read as follows:

Ordered, that the judgment appealed from be reversed, and that final judgment be entered in this court for the defendant, but without prejudice to the plaintiff's right to apply to the court for a reargument.

ISABELLA NICHOLAS v. BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

November 14, 1899.

Nos. 11,749—(71).

Death by Wrongful Act—Negligence of Master—Complaint.

The rule applied that it is the duty of the master to furnish a safe place for his servant to work in. *Held*, the complaint sufficiently alleges that the defendant was guilty of negligence in failing to furnish such a place.

Same—South Dakota Statute.

Held, the statute of South Dakota giving to the widow, heirs, or personal representatives a cause of action for negligence resulting in death is not so much in conflict with the public policy and statutory law of this state that our courts should refuse to enforce it.

Action in the district court for Freeborn county by plaintiff, as widow of Henry B. Nicholas, deceased, to recover $10,000 damages on account of his death. From an order, Kingsley, J., overruling a demurrer to the complaint, defendant appealed. Affirmed.

S. K. Tracy and *Daniel Rohrer*, for appellant.

John A. Lovely and *H. H. Dunn*, for respondent.

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CANTY, J.

This is an action brought under the statute of South Dakota by the widow of one Nicholas for damages for defendant's negligence resulting in his death. Defendant appeals from an order overruling its demurrer to the complaint.

1. The allegations of negligence are as follows:

"That the said Henry B. Nicholas was engaged and employed by said defendant in and upon the construction of a certain bridge on its said line of road near the village of White, in the county of Brookings, in the state of South Dakota. * * *

That the said special work upon which the said Henry B. Nicholas was engaged was the construction of said bridge, in doing which he was then necessarily required, in the performance of his duty, to stand and work at and near an embankment of earth on the land and right of way of said defendant, which said bank of earth was a part of said defendant's roadway, and was supported by timbers, and braces, and planks placed against it by defendant to prevent it from falling, and had been for a long period of time previous to said 26th day of July, 1897, so supported; and that while the said Henry B. Nicholas was so employed to work, at said time and place, and without fault on his part, the said supports gave way and broke, by reason of their rottenness, and weakness, and insufficiency, and the bank of earth so supported thereby came down and fell upon the said Henry B. Nicholas, crushing his body, and skull, and head, and thereby causing his death.

That the said bank of earth so caving and falling upon said Henry B. Nicholas as set forth in the last paragraph was caused and occasioned by the negligence of the defendant in not properly supporting the same, but that the same had been so trussed up and supported to protect the same from falling by insufficient timbers and planks; and that said timbers had been allowed to remain for an unusually long time, and a much longer time than they should have been permitted to remain; and that the said timbers and supports were not properly inspected and examined by the said defendant, and had become old, worn, rotten, and decayed, without being replaced,—all of which was well known to said defendant, but was wholly unknown to said Henry B. Nicholas, who was at work on said bridge, and in proximity to said bank of earth, as above set forth, under the supposition that all the surroundings to his work were safe, and unaware of the negligence of said defendant, as above set forth."

We cannot agree with appellant that the complaint does not show that defendant was guilty of negligence. The case is not, as appellant contends, similar to that of Swanson v. Great Northern Ry.

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Co., 68 Minn. 184, 70 N. W. 978. There the plaintiff was employed in loosening earth and gravel on the slope or bank of a gravel pit. "The place was made dangerous, and its character was continually changing, by reason of the work in which plaintiff and others were engaged." That is not the case here. So far as appears, the character of the place here in question did not change with the progress of the work, but was in a permanent condition, and in that condition was furnished by the master as a place for the servant to work in. Under these circumstances, the rule applies that it is the duty of the master to furnish a safe place for his servant to work in.

2. The complaint further alleges that the statute of South Dakota in force at the time of said injury is as follows:

"If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskilfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants or employees, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid."

We cannot agree with appellant that this statute is so much in conflict with the statutory law and public policy of this state that the courts of this state will refuse to enforce it. On the contrary, we are of the opinion that a cause of action arising under it is enforceable in this state. See Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413.

These are all the questions raised having any merit, and the order appealed from is affirmed.

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CHRISTINA RINES v. GERMAN INSURANCE COMPANY OF FREEPORT.

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November 14, 1899.

Nos. 11,782—(55).

Fire Insurance Policy—Assignment.

Held, an indorsement on the back of a fire insurance policy, assigning "the interest of" the insured "as owner of property covered by this policy," sufficiently shows an intention to assign his interest in the policy.

Assignment to Husband of Owner—Consent of Insurer.

The owner of a lot and building conveyed the premises to plaintiff, and at the same time, by mistake, assigned to plaintiff's husband the insurance policy on the building, to which the insurer consented. Subsequently, and before the fire, the husband assigned the policy to plaintiff, to which the insurer consented. *Held*, conceding that the policy was void while so held by the husband, the latter assignment and the insurer's consent to the same validated the policy, and plaintiff is entitled to recover.

Proof of Loss—Meaning of "Forthwith."

The policy provided that, in case of loss, the insured should forthwith render to the insurer proofs of loss. Such proofs were not rendered until 18 days after the fire. *Held*, under all the circumstances, the proofs were rendered in time.

Action in the district court for Mille Lacs county to recover $400 on a fire insurance policy. The case was tried before Baxter, J., who found in favor of plaintiff; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

M. L. Countryman, for appellant.

Chas. Keith, for respondent.

CANTY, J.[1]

This is an action on a fire insurance policy to recover for a loss. On the trial before the court without a jury the court found for plaintiff, and defendant appeals from an order denying a new trial. But three points are raised.

At the time the policy was issued, one Braton owned the insured building and the lot on which the same was situated, and the policy was issued to him. Thereafter on February 19, 1897, he conveyed

[1] MITCHELL, J., absent.

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the premises to plaintiff, and at the same time, by mistake, transferred the insurance policy to her husband by an indorsement on the same in the following form:

"The interest of Robert Braton as owner of property covered by this policy is hereby assigned to Aug. Rines, subject to the consent of the German Insurance Company of Freeport, Ill.

Robert Braton."

The written consent of the defendant to this transfer was indorsed on the policy March 4. Thereafter her husband, on March 15, 1897, transferred the policy to plaintiff by an indorsement as follows:

"The interest of Aulger Rines as owner of property covered by this policy is hereby assigned to Christina Rines subject to the consent of the German Insurance Company of Freeport. Ill.

Aulger Rines."

On March 25, 1897, defendant indorsed its consent on the policy in the following form:

"The German Insurance Co. of Freeport, Ill., hereby consents that the interest of Aulger Rines as owner of the property covered by this policy be assigned to Christina Rines.

Wm. Trembor, Secy."

The loss occurred afterwards, in June, 1897.

1. We are of the opinion that each of the two indorsements first above quoted shows an intention to transfer to the person named therein the insurance policy. See North British v. Gunter, 12 Tex. Civ. App. 598, 35 S. W. 715.

2. Appellant further contends that, as the policy was void in the hands of Aulger Rines, he had nothing to assign, and could, therefore, transfer nothing to plaintiff. We cannot so hold. By consenting to the transfer of the policy to plaintiff, the defendant waived the illegality, and validated the policy. North British v. Gunter, supra; Shearman v. Niagara, 46 N. Y. 526; Ellis v. Insurance Co. of North America (C. C.) 32 Fed. 646.

3. The policy provides:

"In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith

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rendered to the company, setting forth the value of the property insured, except in case of total loss on buildings the value of said buildings need not be stated, the interest of the insured therein, all other insurance therein in detail, the purposes for which and the persons by whom the building insured or containing the property insured was used, and the time at which and the manner in which the fire originated, so far as known to the insured."

In this case the proofs of loss were mailed to the defendant 18 days and received by it 21 days after the fire, and it is contended that the proofs were not furnished in time, and that, therefore, the policy is void, and plaintiff cannot recover. We cannot so hold. "Forthwith" means "with due diligence under the circumstances of the case, and without unnecessary or unreasonable delay." 2 May, Ins. § 462. There are cases holding that notice of loss given within less time than 18 days after the fire is not given "forthwith." Id. But a notice of loss is a simple matter, while such a proof of loss as is required by the above-quoted provision of the policy is not. It may take considerable time to prepare such a proof of loss, and may require the services of an attorney, or some one skilled in the business. Under these circumstances we cannot hold that 18 days after the fire is an unreasonable time in which to render the same.

Order affirmed.

A. E. JOHNSON COMPANY v. D. M. WHITE and Others.

November 14, 1899.

Nos. 11,785—(74).

Complaint in Intervention.

In an action brought against the defendant on promissory notes made by him alone, a third party intervened, and he and the defendant joined in a complaint of intervention, in which they alleged that they were partners, that the notes were given by the defendant in settlement of a partnership debt, and they set up various counterclaims for debts due from plaintiff to them as such partners. *Held*, under our statute, such intervention and complaint in intervention are proper.

Same—Counterclaim—Demurrer.

If any of the counterclaims stated in such complaint are sufficient, a demurrer for insufficiency to the whole complaint should be overruled.

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Appeal by plaintiff from an order of the district court for St. Louis county, Ensign, J., overruling a demurrer to a complaint in intervention. Affirmed.

Phelps & McManus, for appellant.

John Jenswold, Jr., for respondents.

CANTY, J.

1. This action was brought against the defendant, White, on a number of promissory notes made by him to the plaintiff corporation. He answered, alleging that the notes were made by him in settlement of a debt of a partnership firm consisting of himself and one Staberg, and stating the transaction out of which the debt arose. He pleads various matters, and sets up several defenses, among them failure of consideration. Thereupon Staberg intervened in the action, and he and defendant White joined in a complaint of intervention, in which they state the same facts, allege that Staberg is insolvent, and plead several counterclaims for sums owing from plaintiff to them as such partners. Plaintiff demurred to this complaint on the ground that it does not state facts sufficient to constitute a ground of intervention, and does not state a counterclaim, and appeals from an order overruling the demurrer.

In our opinion, the order appealed from should be affirmed. The intervention complaint alleges, in effect, that the liability of the defendant to plaintiff is that of a surety for the firm of White & Staberg, and the case is covered by Becker v. Northway, 44 Minn. 61, 46 N. W. 210. G. S. 1894, § 5273, provides:

"Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, * * * may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff."

The intervenor in this case has an interest in the matter in litigation in the success of the defendant, and has joined with him in resisting the claim of the plaintiff. In fact, the relation of White & Staberg to White in the matter here in litigation is more close, and the interest more direct, than is the ordinary relation or interest of a principal debtor to his surety.

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2. Some of the counterclaims set up in such complaint are sufficient, and, whether or not each of the matters or counterclaims so set up, taken alone, is sufficient, is immaterial, as the demurrer is to the whole complaint, and not to any particular part of it.

Order affirmed.

AUGUST SCHUMACHER v. PABST BREWING COMPANY.

November 14, 1899.

Nos. 11,795—(53).

Lease—Authority of Agent.

An agent, authorized to negotiate for or make a lease for three years, made one for three years with the privilege to the lessee of a renewal for two years more. On the evidence, *held*, the alleged lessor never ratified the unauthorized lease so made.

Breach of Contract—Meeting of Minds.

The alleged lessor subsequently offered the alleged lessee a new lease for the period of three years, but, before the offer was accepted, it was withdrawn. In an action by such lessee for damages for breach of the contract, in refusing to permit him to take possession, *held*, the minds of the parties never met, no contract of leasing was ever made between them, and plaintiff cannot recover.

Action in the district court for Carlton county to recover $2,100 damages for failure to deliver possession under a lease and $20 for moneys paid and repairs made at defendant's request. The case was tried before Ensign, J., and a jury, which rendered a verdict in favor of plaintiff for $546.14; and from an order denying a motion for a new trial, or that judgment be entered in favor of plaintiff for $6.14, notwithstanding the verdict, defendant appealed. Reversed.

Schmidt, Reynolds & Mitchell, for appellant.

Baldwin & Baldwin, for respondent.

CANTY, J.

The complaint alleges that plaintiff rented of defendant a certain store building, together with certain saloon furniture and fixtures to be placed therein by defendant; that plaintiff agreed to pay there-

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for as rent the sum of $15 per month; that the term of the lease was for three years, with the privilege of renewal for the term of two years more on the same terms and conditions; that, after making the lease, defendant refused to permit plaintiff to take possession of the premises; that the reasonable rental value of the same for said term is $50 per month; and plaintiff demands damages for the breach of the contract in refusing to permit him to take possession. The answer is a general denial. On the trial, plaintiff had a verdict, and from an order denying a new trial defendant appeals.

One Rickford was the agent of defendant at Duluth. The premises in question are at Carlton, and in October, 1897, were vacant and unoccupied. Rickford went to Carlton, examined the property, and on October 23, 1897, reported by letter to defendant, at Milwaukee, Wisconsin, that plaintiff wanted to rent the building for three years at $15 per month; the building to be repaired, and certain saloon furniture and fixtures placed in the same. On October 25 defendant answered. The letter is somewhat vague in its terms, but, for the purposes of this case, we will concede that, as plaintiff contends, such letter gave Rickford authority to negotiate with plaintiff for a lease for three years. On receipt of this letter by Rickford, a lease was drawn up, by the terms of which defendant leased the premises to plaintiff for the term of three years from and after November 1, 1897, with the right to plaintiff to a renewal of the lease on the same terms for two years more. Rickford executed this lease in the name of defendant, and plaintiff signed it also. Rickford then sent the lease to Milwaukee, to defendant, who promptly thereafter, on October 30, wrote him a letter repudiating the lease.

Thereafter, on November 2, defendant again wrote Rickford, requesting him to get plaintiff to sign inclosed copies of a proposed lease with plaintiff for a term of three years from November 1, signed by defendant's executive officers. Rickford presented these copies to plaintiff for signature, and informed him that defendant had repudiated the first lease, but there is a conflict of testimony as to when this was done. Rickford testified that he did so on or about November 12, while plaintiff testified that it was after November 26. In the meantime defendant had consigned the saloon fixtures to plaintiff from Milwaukee. He refused to pay the freight

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on them, but did pay some other items of expense incurred by him for and on account of defendant in fitting up the premises for a saloon, but these things were not done in pursuance of the alleged contract of leasing. About December 1 Rickford again called on plaintiff, and requested him to sign the new lease. There is a conflict of testimony as to what then occurred. Rickford testified that plaintiff refused to sign it, while the latter testified that he did not refuse to sign it, but took it over to see his wife about it, with Rickford's consent, and when he returned Rickford was gone. The premises were shortly afterwards rented to another party.

In our opinion, the evidence will not warrant a finding that Rickford had authority to insert the renewal clause in the first lease, or authority either to make or negotiate a lease for a longer time than three years. We are also of the opinion that the evidence will not warrant a finding that defendant ever ratified the first lease, or any negotiations of Rickford for a lease for any longer time than three years; and the court below charged the jury that plaintiff was not entitled to recover damages for any longer period than such three years. But if Rickford had no authority to make a lease for more than three years, and the first lease, containing such renewal clause, was never ratified by the defendant, then the minds of the parties never met, and no lease or agreement for a lease was ever made at all. Plaintiff supposed that he was getting what was practically a five-year lease, while there was no authority to grant him more than a three-year lease, or agreement for the same. Under these circumstances, plaintiff was never bound by any lease or agreement for a lease at all, and therefore cannot insist that defendant was bound. According to plaintiff's own testimony, he never accepted the three-year lease that was offered him, and before he got ready to accept it the offer of it was by defendant withdrawn, and a lease made to another party. Then plaintiff cannot recover for a breach of a contract which was never entered into. This renders it unnecessary to consider any of the other questions raised.

The order appealed from is reversed, and a new trial granted.

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LONDON & NORTHWEST AMERICAN MORTGAGE COMPANY v. JAMES McMILLAN.

November 15, 1899.

Nos. 11,724—(32).

Assignment of Error—Exception.

Several assignments of error *held* unavailing to appellant, because no exceptions were taken to the rulings of the court below, upon which they are based.

Same—Date of Breach of Contract.

Another assignment *held* of no value because based upon a wrong assumption as to the day upon which a breach of the contract involved herein occurred.

Same.

Another assignment *held* too broad for the purpose intended.

Specific Performance—Form of Decree.

In an action for specific performance of a contract for the sale and purchase of real property, brought by a vendor against a vendee, on the ground that the latter refuses to perform, the court should find in its decree the amount due on the contract. It is also proper that it should fix a reasonable time in the decree within which the money must be paid, and also provide that, in case of the vendor's default, his rights and interests in the property shall then be terminated and extinguished.

Action in the district court for Ramsey county to enforce specific performance of a contract for purchase of land. The complaint alleged in substance, among other things, that plaintiff was on September 22, 1892, owner of a note and mortgage made by defendant to secure payment of $15,000 and interest, and that defendant was then in default; that plaintiff and defendant then entered into a contract whereby plaintiff agreed to foreclose the mortgage and bid in the premises for the full amount of the debt and expenses of foreclosure, and to assign the sheriff's certificate of sale to defendant for the amount so to be bid and interest, and whereby defendant agreed to pay said sum in consideration of such assignment; that on execution of the contract defendant paid $602.80 on account; that plaintiff caused the mortgage to be foreclosed, and on

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November 14, 1892, bid in the premises for $16,063.90; that on December 27, 1892, defendant paid plaintiff on account the further sum of $5,515.90, and that the time for payment of the balance was extended until November 14, 1893; that on September 30, 1893, the time for payment was extended until November 14, 1895, and that in consideration of the extension defendant agreed to pay the balance and interest at that date, and to pay taxes on the premises; that on April 1, 1898, plaintiff tendered performance, but that defendant refused to perform; and that the reasonable value of the premises was $5,000. The answer was a general denial. The case was tried before Kelly, J., who found the foregoing facts, and as conclusions of law found that there was due to plaintiff on the contract $13,344.44; that plaintiff was entitled to judgment that defendant pay said sum with costs within 90 days after service upon him of a copy of the judgment to be entered and on delivery of a deed of the premises and an assignment of the sheriff's certificate; and that in default of such payment plaintiff be adjudged to be the owner of the land free from redemption, and recover of defendant $8,344.44 with costs. From a judgment entered pursuant to the findings, defendant appealed. Affirmed.

Jayne & Halliwell, for appellant.

W. H. Yardley, for respondent.

COLLINS, J.

1. The first, second, third, and fifth assignments of error, relating to rulings of the trial court when receiving evidence, are valueless to defendant's counsel, because no exceptions were taken to the rulings in question.

2. The fourth assignment is that the court erred when admitting testimony as to the value of the real property on April 1, 1898, "or on any other date than November 14, 1892." The force of this assignment of error is controlled by that part which we have quoted, and it therefore amounts to nothing more than the contention that the measure of damages was the difference between the contract price November 14, 1892, the day on which defendant was to take the assignment of the sheriff's certificate, and the value of the property on that day. This assignment is also without merit. There was no breach of the contract on November 14, 1892, on which an

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action could be based; for it stands admitted by all parties that subsequently, December 27, 1892, defendant paid to plaintiff over $5,000 on account of the purchase price, and thereupon, by mutual consent, the time for payment of the balance was extended until November 14, 1893,—almost one year.

3. The sixth assignment of error is of an omnibus nature, and entirely too broad to reach the points argued by counsel.

The court, by its decree, adjudged that there was due to plaintiff, as the balance on the contract, August 4, 1898, the sum of $13,369.30, ordered that payment of that sum to plaintiff should be made by defendant within 90 days after service of a copy of the decree; and, further, that, if payment was not so made, plaintiff should hold the land, and also recover of defendant the sum of $8,369.30, the difference between the contract price and the value of the land as determined by the court. The assignment of error is as follows:

"(6) The court erred in making the decree on August 4, 1898, adjudging that there was due from appellant to respondent the sum of $13,369.30, or any other sum, and directing that appellant pay said sum to respondent within 90 days from the service of a copy upon him of the judgment and decree, and that, in default of said payment within said time, respondent should hold the land without further right of redemption on the part of appellant, and that respondent should recover from appellant the sum of $8,369.30 or any other sum."

Counsel for defendant attempt to make several points on this assignment, but the only one which we need to mention is that covered in their brief, as follows:

"The court erred in the nature of the decree made. The action brought was, in all essential respects, an action to foreclose a land contract, and should be governed by the same regulations and conditions as an action to foreclose a mortgage. Judgment should have been entered, therefore, adjudging the amount due, and the sale of the premises to satisfy said amount, and directing the sheriff to proceed to sell the same, according to the provisions of law relating to sales of real estate on execution, and one year allowed to appellant, or those claiming under him, in which to redeem."

Here counsel contend simply that a public sale should have been ordered with the statutory period of redemption of one year, instead

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of a strict foreclosure at the expiration of the 90-day period within which defendant could pay the contract price and retain the land; and they also insist that the amount due on the contract should have been determined by the court. But this is exactly what was done when the amount adjudged to be due was fixed at $13,369.30, and yet counsel insist in the beginning of this sixth assignment that it was error so to determine. The assignment must be taken as a whole, and, as before stated, is too broad.

But, unless we are to disregard the statement of counsel that this was an action to foreclose a land contract, the court made no mistake when fixing a period of 90 days after service of a copy of the decree within which defendant should pay or forfeit all right in the premises. We must take counsel at their word as to the nature of this proceeding and the transaction on which it is based. But we must not be understood as agreeing with them in the proposition that defendant's rights were only those of a vendee in a contract for the sale and purchase of land, for he had been plaintiff's mortgagor, and may have remained so when this action was instituted, and, consequently, with all of the rights of a mortgagor against whom an action to foreclose had been brought. Taking counsel's view of the nature of this proceeding, the decree finding the sum due on the contract, and requiring its payment to plaintiff (vendor) within 90 days after notice,—obviously a reasonable time,—and, in case of default, declaring the defendant's (vendee's) rights and interests in the land terminated and extinguished, was correct. Thayer v. Wilmington, 105 Ill. 540. The statute providing for execution and mortgage foreclosure sales, and which grants the right to redeem therefrom, has no application in the case at bar.

4. What has been said as to the sixth assignment of error disposes of the seventh.

Judgment affirmed.

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DAVID C. BELL v. ABBY G. MENDENHALL and Others.

November 15, 1899.

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Nos. 11,752—(56).

"Indebtedness."

"Indebtedness" is a word of large meaning, and is used to denote almost every kind of pecuniary obligation originating in contract. The word *held* to cover the debtor's joint as well as several liabilities, and also his liabilities contracted by indorsement, whether then due or to become due.

Payment of "Outstanding Indebtedness."

Where a contract provided for the payment by one of the parties of "all of the outstanding indebtedness" of the other parties, two in number, "not to exceed in the aggregate the sum of $130,000," the contract must speak for itself as to what debts are to be paid. A party, under the guise of showing what the real consideration was therefor, will not be permitted to cut down or vary his covenant to pay by proof of a parol agreement, antecedent or contemporaneous, that he should pay a part only of all of the indebtedness.

Payment within Reasonable Time.

The consideration for this promise to pay was, as stated in the contract, that the other parties whose indebtedness was to be paid should execute and deliver to the promisor, a trust company organized under G. S. 1894, § 2849 et seq., deeds of conveyance of certain specified real property, whereupon the $130,000 should be paid "within reasonable time thereafter, or as soon as under the circumstances shall be required." The court found as facts that the deeds in question were executed and delivered "during the year 1893," and that the trust company took possession of the property "after May 1, 1893." *Held*, under these findings, that no obligation to pay debts arose until the year 1893 expired (that is, not before January 1, 1894), and that the company could not be compelled to pay an amount, as interest or otherwise, in excess of $130,000, as of the date last mentioned.

Total Debt—Interest.

January 1, 1894, the indebtedness exceeded the sum of $130,000. *Held* that, for the purpose of ascertaining what percentage of his claim each creditor should be paid, interest upon interest-bearing claims should be computed to that day, and the amounts added to the principal sums due, or thereafter to mature.

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Interest on Payments.

The contract provided that the trust company should receive interest upon all payments made by it at the rate of 7 per cent. *Held* that, as between the company and the creditors, the rate of interest to be paid by the former on the percentage is 7 per cent.

Interest on Balance Due.

Where there is an open, running, and unliquidated account, with items of debit and credit, the debtor's agreement to pay interest on a balance due from the time of the last item on the debit side is implied.

Action in the district court for Hennepin county by plaintiff as receiver of City Bank against Abby G. Mendenhall, R. J. Mendenhall, and the Minneapolis Trust Company. Plaintiff's cause of action was predicated on a judgment for $4,021.90 against the Mendenhalls, and upon a trust agreement between the Trust Company and the Mendenhalls, in pursuance of which they had conveyed to it practically all their property and whereby the Trust Company agreed to pay their outstanding indebtedness. The allegations of the complaint are set forth in the opinion of the supreme court reported in 71 Minn. 331. The complaint prayed that all parties who desired to participate in the trust fund be required to appear and present their claims, that plaintiff have judgment against the Trust Company for the amount of his claim, and that if the fund proved insufficient plaintiff be allowed to share it with other creditors. In response to an order citing in the other creditors, Crane Company and Albert S. Webb, among others, appeared and filed complaints in intervention. The case was tried before McGee, J., who made findings of fact and conclusions of law, and ordered judgment in favor of plaintiff and other creditors for a certain percentage of their claims; and from a judgment entered pursuant to the order, defendant Trust Company appealed. Modified.

W. E. Dodge and *C. S. Albert*, for appellant.

Extrinsic evidence was admissible to show the atmosphere surrounding the inception of the contract, to limit and define the consideration, and to explain the meaning of the words "outstanding indebtedness," which embrace the consideration and are susceptible of different interpretations. The case involves no element of estop-

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pel. The liability of the Trust Company arose from an original and independent promise, and it became the principal debtor. Guderian v. Leland, 61 Minn. 67, 71. Extrinsic evidence is always admissible to show the real consideration, purpose and subject-matter of a contract. Baldwin v. Winslow, 2 Minn. 174 (213); Case v. Young, 3 Minn. 140 (209); Ames v. First Div. St. P. & P. R. Co., 12 Minn. 295 (412); Donnelly v. Simonton, 13 Minn. 278 (301); Kelly v. Bronson, 26 Minn. 359; Harrington v. Samples, 36 Minn. 200; King v. Merriman, 38 Minn. 47; Sayre v. Burdick, 47 Minn. 367; Rugland v. Thompson, 48 Minn. 539; Beyerstedt v. Winona Mill Co., 49 Minn. 1; Ham v. Johnson, 51 Minn. 105, 107; Staples v. Edwards & McCulloch L. Co., 56 Minn. 16; Longfellow v. McGregor, 56 Minn. 312; Engel v. Scott & Holston L. Co., 60 Minn. 39; Pfeifer v. National Live S. Ins. Co., 62 Minn. 536; Board of Trustees of Ripon College v. Brown, 66 Minn. 179; Waldheim v. Miller, 97 Wis. 300; Swedish-American Nat. Bank v. Germania Bank, 76 Minn. 409; Reed v. Insurance Co., 95 U. S. 23; Peugh v. Davis, 96 U. S. 332, 336; Chicago v. Sheldon, 9 Wall. 50; Thomas v. Railroad Co., 101 U. S. 71, 86; Topliff v. Topliff, 122 U. S. 121; Lowry v. Adams, 22 Vt. 160; Noyes v. Canfield, 27 Vt. 79; Winn v. Chamberlin, 32 Vt. 318; Redfield v. Gleason, 61 Vt. 220; Herring v. Boston, 1 Gray, 134, 138; Sargent v. Adams, 3 Gray, 72, 78; Pike v. Fay, 101 Mass. 134; Swett v. Shumway, 102 Mass. 365; Stoops v. Smith, 100 Mass. 63; Atwater v. Clancy, 107 Mass. 369; Lovejoy v. Lovett, 124 Mass. 270; Agawam v. Strever, 18 N. Y. 502; Filkins v. Whyland, 24 N. Y. 338, 344; Whites v. Myles, 73 N. Y. 335; Juilliard v. Chaffee, 92 N. Y. 529; Burditt v. Hunt, 25 Me. 419; Coquillard v. Hovey, 23 Neb. 622; Hersom v. Henderson, 21 N. H. 224; Vinton v. Baldwin, 95 Ind. 433; Lyles v. Lescher, 108 Ind. 382; Louisville v. Reynolds, 118 Ind. 170; Barrett v. Stow, 15 Ill. 423; Vermont v. Brose, 104 Ill. 206; McNulta v. Corn, 164 Ill. 427, 451; Ganson v. Madigan, 15 Wis. 158; Janesville v. Ford, 82 Wis. 416; Nilson v. Morse, 52 Wis. 240; Hosmer v. McDonald, 80 Wis. 54; Beason v. Kurz, 66 Wis. 448; Quarry v. Clements, 38 Oh. St. 587; Patterson v. Camden, 25 Mo. 13; St. Louis v. City, 46 Mo. 121; Tufts v. Greenewald, 66 Miss. 360; Giddings v. Day, 84 Tex. 605; Kingston v. Pickins, 46 Tex. 99, 101; Wilson v. Smith, 50 Tex. 365, 369; D'Aquin v. Barbour, 4 La. An.

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441; Wendlinger v. Smith, 75 Va. 309; Peisch v. Dickson, 1 Mason, 9, 11; Browne, Par. Ev. 118; Colpoys v. Colpoys, Jacob, 451; Greenleaf, Ev. (13th Ed.) § 298; Knight v. New England, 2 Cush. 271, 283; Bainbridge v. Wade (1850) 20 L. J. Q. B. 7; Roots v. Snelling, 48 L. T. (N. S.) 216; Barry v. Bennett, 7 Metc. (Mass.) 354.

The contract as interpreted by plaintiff was ultra vires. Field, Ultra Vires, 57–59; Trustees of Dartmouth College v. Woodward, 4 Wheat. 518; Hood v. New York, 22 Conn. 1, 502; Franklin v. Lewiston, 68 Me. 43; Bissell v. Michigan, 22 N. Y. 258. A contract of guaranty, not within the express powers of a corporation, is ultra vires and void. Koehler v. Reinheimer, 20 Misc. (N. Y.) 62; Morawetz, Corp. § 423; Tod v. Kentucky Union L. Co., 57 Fed. 47; Davis v. Old Colony, 131 Mass. 258; Madison v. Watertown, 7 Wis. 53; Ætna v. Charter, 50 Conn. 167; Louisville, N. A. & C. R. Co. v. Ohio Valley Imp. & C. Co., 69 Fed. 431; National v. German-American, 116 N. Y. 281, 292; Central v. Empire, 26 Barb. 23; Morford v. Farmers, 26 Barb. 568; Monument v. Globe, 101 Mass. 57; Culver v. Reno, 91 Pa. St. 367; Hall v. Auburn, 27 Cal. 256; Colman v. Eastern, 10 Beav. 1.

The court erred in allowing interest on the claims of Crane Company and Webb. Interest is not chargeable on open accounts which have not been liquidated, and a balance expressly agreed upon. Forgay v. Hamlin, 3 La. An. 697; Clark v. Clark, 46 Conn. 586, 589. Interest is not recoverable on an unliquidated book account till a balance is agreed on and demand made. Broom v. Henman, 1 Root (Conn.) 248; Temple v. Belding, 1 Root (Conn.) 314; Skirving v. Executors, 2 Bay (So. C.) 233. See also Sibley v. County of Pine, 31 Minn. 201; Perine v. Grand Lodge A. O. U. W., 51 Minn. 224; Wood v. Hickok, 2 Wend. 501; Walden v. Sherburne, 15 Johns. 409; Patterson v. Choate, 7 Wend. 441; Reid v. President, 3 Cow. 393; McKnight v. Dunlop, 4 Barb. 36; Doyle v. St. James, 7 Wend. 178; Beers v. Reynolds, 12 Barb. 288; Tucker v. Ives, 6 Cow. 193; 11 Am. & Eng. Enc. 384; Mason Craig v. Callender, Flint & Co., 2 Minn. 302 (350); Leyde v. Martin, 16 Minn. 24 (38); Cooper & Lavely v. Reaney, 4 Minn. 413 (528).

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Harlan P. Roberts, for plaintiff respondent.

Though parol evidence may be introduced to show that the real consideration was different from that which appears on the face of the deed or agreement, this rule is subject to the limitation that such evidence is not admissible to defeat or vary the terms of a written contract. Sayre v. Burdick, 47 Minn. 367; Bruns v. Schreiber, 43 Minn. 468; Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Home Ins. Co., 55 Minn. 236; Lawton v. St. Paul Permanent L. Co., 56 Minn. 353. Where a corporation has received the fruits of a contract, it will not be heard to set up the defense of ultra vires, when the other party sues for the price. 28 Am. Law Rev. 376; Field, Ultra Vires, 174, et seq.; State v. Citizens, 47 Ind. 407; Bradley v. Ballard, 55 Ill. 413; DeGroff v. American, 21 N. Y. 124; Palmer v. Lawrence, 3 Sandf. 161, 170; 27 Am. & Eng. Enc. 363; Seymour v. Chicago G. F. L. Soc., 54 Minn. 147; Central B. & L. Assn. v. Lampson, 60 Minn. 422; Erb v. Yoerg, 64 Minn. 463.

Robert G. Morrison, for respondents Crane Company and Webb.

The prior agreements were merged in that of May 1, 1893. Van Ness v. Mayor, 4 Pet. 232; Potomac S. Co. v. Upper Potomac S. Co., 109 U. S. 672, 3 L. R. A. 308, note. The written contract must speak exclusively for itself. 2 Parsons, Cont. 680; Wheat v. Hamilton, 53 Ind. 256; Spingarm v. Rosenfeld, 4 Misc. (N. Y.) 523, 525; Doe v. Webster, 4 P. & D. 270, 273; Goodrich v. Longley, 1 Gray, 379; Greenleaf, Ev. § 286, note. The Trust Company was estopped to set up the defense of ultra vires. 5 Thompson, Corp. § 6016; Seymour v. Chicago G. F. L. Soc., 54 Minn. 147, 149. If the contract was ultra vires, it was so only in part, and can therefore be enforced against the Trust Company. 5 Thompson, Corp. § 5975. The contract was, however, within the corporate powers. G. S. 1898, § 2849; Milnor v. Home S. & L. Assn., 64 Minn. 500, 504. Every advancement for accommodation of another, to be repaid by the person receiving the money, is a loan. Freeman v. Brittin, 2 Harr. (N. J.) 191, 206; 13 Am. & Eng. Enc. 977, note.

The contract included payment of the individual debts of R. J. Mendenhall. Duvall v. Craig, 2 Wheat. 45; 2 Brandt, Sur. & Guar. § 309; Kirby v. Turner, Hopkins, Ch. (N. Y.) 309; Tuman v. Pills-

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bury, 60 Minn. 520. The accounts of these respondents draw interest. If the amount is capable of being ascertained by mere computation, it will draw interest. McMahon v. New York, 20 N. Y. 463, 469; Graham v. Chrystal, 1 Abb. Pr. (N. S.) 121, 124; Peetsch v. Quinn, 7 Misc. (N. Y.) 6, 7. Respondents' accounts are, however, liquidated and certain in amount, and interest should be allowed. 2 Sutherland, Dam. § 617; 11 Am. & Eng. Enc. 386. An account of items on one side of goods sold and on the other of payments made is not a mutual, open, current account. Cousins v. St. Paul, M. & M. Ry. Co., 43 Minn. 219; 16 Am. & Eng. Enc. 6; 1 Abbott, Law Dict. 11. See 2 Sutherland, Dam. §§ 610, 615, 616; 1 Sedgwick, Dam. § 308; Young v. Dickey, 63 Ind. 31; Rend v. Boord, 75 Ind. 307; Sibley v. County of Pine, 31 Minn. 201; County of Redwood v. Winona & St. P. L. Co., 40 Minn. 512, 522. A promise to pay the debt of another, no time being specified, is a promise to pay forthwith if due, and damages are the debt and interest. Furnas v. Durgin, 119 Mass. 500; Perley, Int. 97. No time for payment was specified, and hence payment was to be on delivery, and interest runs from that time. Horn v. Hansen, 56 Minn. 43, 47; Fishback v. G. W. Van Dusen & Co., 33 Minn. 111, 116; Security Bank of Minnesota v. Luttgen, 29 Minn. 128; Iselin v. Simon, 62 Minn. 128.

COLLINS, J.

A general demurrer to the original complaint in this action was overruled in the district court, and on appeal the order was affirmed. 71 Minn. 331, 73 N. W. 1086. Subsequently plaintiff amended his complaint so as to bring in all creditors whose claims had not been allowed, that their rights might be equitably adjusted. A trial was had, and the court made findings of fact, with conclusions of law; judgment being ordered in favor of plaintiff and the respondents Webb and the Crane Company, and also in favor of other creditors, for a certain percentage of the amount of each of their claims. This appeal is from the judgment thereafter entered.

There are two points argued by counsel for appellant trust company which are common to all of the respondents, and which should be first disposed of:

1. The trial court excluded and rejected certain written and oral

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testimony which was offered by the trust company for the avowed purpose of explaining the intent of the parties to the trust contract when using the words "outstanding indebtedness" therein, and to show that the claims herein involved were not among those which, up to the limit of $130,000, the trustee had agreed to pay, and that just what debts were within the contract, and to be provided for by it, were well known and agreed upon by the parties at and prior to its execution, May 1, 1893. The rejected written instruments were, with one exception, of an earlier date than the contract, and consisted of letters from Mr. Mendenhall to the officers of the trust company, and an alleged list or schedule of liabilities prepared by him and transmitted pending the negotiations. The claims now in controversy were not in this list. The oral testimony was of conversations between Mr. Mendenhall and the officers, prior to the contract, tending to show that certain debts specified in the list, and none other, were covered by the words "all of the outstanding indebtedness" of the Mendenhalls.

The effect of this class of evidence, if received and relied upon by the court when making its findings, would have been to cut down and limit the liability of the trust company to the debts expressly mentioned in the list or schedule before mentioned as having been submitted by Mr. Mendenhall when he proposed to the company that it become trustee, but in no manner referred to or made a part of the contract, in which it was stipulated that the indebtedness to be taken care of was "all of the outstanding indebtedness of said second parties," not exceeding $130,000. Not the debts or liabilities listed and scheduled at some prior time, and in which list no mention was made of the liability incurred when the Mendenhalls, either prior to the delivery, and for the purpose of giving additional credit thereto, or as indorsers,—and it is not material which,—placed their names on the back of the James note, but all of the outstanding indebtedness. The phrase "all indebtedness" included all pecuniary liabilities of each and both of the debtors, present, or already incurred, but to mature in the future. "Indebtedness" is a word of large meaning, and is used to denote almost every kind of pecuniary obligation originating in contract. It must be held to cover the debtor's joint as well as his several liabilities, and also

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his liabilities contracted by indorsement, whether then due or to become due. Merriman v. Social, 12 R. I. 175; Chicago v. Lundstrom 16 Neb. 254, 20 N. W. 198; City v. Gardner, 97 Ind. 1; Scott v. City 34 Iowa, 208.

To give any weight to the evidence in question would be to make a new contract for the parties; for, as was said when the case was here before, the covenant to pay is clearly and concisely expressed, —has no uncertainty in its meaning,—and the promise was for the equal and ratable benefit of all of the creditors. The character of conclusiveness is given to written instruments deliberately adopted by the parties as embodying their final agreements, and as to the terms, conditions, and limitations thereof the written contracts must speak for themselves. Nor will a party, under the guise of showing what the real consideration of a contract was, be permitted to cut down or vary the stipulations of his written covenant by proof of a parol agreement, either antecedent to or contemporaneous with the writing. Bruns v. Schreiber, 43 Minn. 468, 45 N. W. 861; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; 2 Parsons, Cont. 680.

The attempt to show that, prior to the execution of the contract in which the trust company agreed to pay all of the indebtedness, it was the verbal understanding that only a part should be paid, was properly excluded by the court below. If the parties desired to limit the liability of the trust company, either by confining such liability to the indebtedness mentioned in the list, or to their joint obligations, it would have been an easy matter to have so written the agreement. This was not done, and, if their actual meaning and intention are not set forth in that instrument, it is an unfortunate omission, for which there is no remedy under the pleadings in this action.

2. It is argued that the contract was ultra vires of the trust company, and for that reason there can be no recovery by either plaintiff or the intervenors. This point was made on the former appeal, but, for reasons stated in the opinion, was not before the court. It was there held that the promise of the company was not collateral or contingent, or one making it a guarantor or surety,

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but was an original promise upon a new and independent consideration moving directly from the Mendenhalls to it.

It is possible that counsel are right when contending that such a promise is in excess of the powers of a trust company organized, as this was, under the provisions of G. S. 1894, § 2849, et seq. The question is an open one, for it might be argued with great plausibility that such part of the transaction as required the company to furnish money with which to pay off the indebtedness amounted to nothing more than an agreement to loan money to the debtors, to be paid directly to the creditors. But, whether or not this is true, a determination of the question is not necessary to a disposition of the case. Long before the commencement of this action the Mendenhalls conveyed their property to the trust company, and the latter retains the same, or the proceeds of a sale. It has received, and still holds, the fruits or benefits of the contract. Under such circumstances, it cannot be permitted to repudiate the obligation it assumed, for there are few rules that are better settled, or more strongly supported by authorities, with fewer exceptions, in this country, than that when a contract by a private corporation, which is otherwise not objectionable, has been performed on one side, the party which has received and retained the benefits of such performance shall not be permitted to evade performance on the ground that the contract was in excess of the purpose for which the corporation was created. Seymour v. Chicago G. F. L. Soc., 54 Minn. 147, 149, 55 N. W. 907; 5 Thompson, Corp. §§ 5975, 6016.

3. The contract of date May 1, 1893, provided that, upon the execution and delivery of the deeds of the property, the company should, "within reasonable time thereafter, or as soon as under the circumstances shall be required," in addition to certain other payments and duties, "pay all of the outstanding indebtedness of" said Mendenhalls; "such payments not to exceed in the aggregate the sum of $130,000." According to its clear and unmistakable terms, the trust company was under no obligations to pay in excess of $130,000; and this amount it was not to pay as of the date of the contract, but within a reasonable time, or as soon as, under the circumstances, should be required, after the debtors conveyed their property to it. Any judgment which was based upon payment of

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$130,000 as of May 1, 1893, or which obliged the company to pay more than it had agreed to, in the way of interest or otherwise, was erroneous.

As the debts exceeded $130,000 when the contract was entered into, and interest thereon was accruing, it was necessary, in order to ascertain the percentage to be paid, and to render a proper judgment, for the court to find as a fact at what time the deeds were executed and delivered to the trust company. The only finding on this was that delivery was made "during the year 1893," and it was further found that the company went into possession of the property "after May 1, 1893." There was no finding as to when the "reasonable time" for payment arrived, or when, "under the circumstances," payment should have been required.

With a finding simply that the deeds were delivered "during the year 1893," it is obvious that it must be held that no duty to pay devolved on the company until the year 1893 had expired; that is, not prior to January 1, 1894. The burden of showing the liability on the part of the trust company was upon the creditors in this action, and, taking the most favorable view of the finding for such creditors, no obligation to pay over the sum of $130,000, the maximum limit of liability, arose until January 1, 1894. Interest on the debts prior to that day could not be added to the burden assumed by the company. Such interest, up to January 1, 1894, at the rates stipulated in the evidence of the indebtedness, or at the legal rate if there was no stipulation, in all instances where the debts bore interest, should have been computed, and added to the principal, not for the purpose of compelling the company to pay, in the aggregate, in excess of the amount it had agreed to pay, but simply for the purpose of discovering the basis in percentage on which to distribute the trust fund as of January 1, 1894. All sums which were then determined to be due and payable as a part of this fund would, if interest-bearing obligations as to the Mendenhalls, thereafter bear interest as against the company, at the rate of seven per cent.; that being the rate fixed in the contract to be paid on all sums paid or advanced by such company. Under its contract, the latter cannot be held to pay interest at a greater rate than that fixed for it to receive.

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Under the rules herein laid down, the court erred when fixing the percentage amount to be paid plaintiff, and again erred when it fixed the rate of interest at eight per cent. on this amount.

4. The claims of the intervenors, Webb and the Crane Company, consisted of open accounts. That of Webb consisted of items of goods and merchandise sold and delivered to Mr. Mendenhall upon different days between April 10, 1889, and April 28, 1893, with items of credits, cash payments beginning May 1, 1889, and ending June 25, 1896. The court excluded from the account all debit items subsequent to May 1, 1893, and crediting the account remaining with the full amount of the payments, found the balance due to be $230.88, on which interest was allowed at seven per cent. from the date last mentioned. This was error, for interest should have been allowed on the balance from June 25, 1896, only.

The Crane Company account consisted of items of goods and merchandise sold and delivered to Mr. Mendenhall between June 14 and October 12, 1892, with credits of cash paid and goods returned between July 30, 1892, and February 6, 1893; the balance found due being $398.40, on which the court allowed interest at seven per cent. from May 1, 1893. This was error, but the trust company has no cause for complaint. Interest should have been computed on the balance from the date of the last item on the debit side, February 6, 1893, up to January 1, 1894, and on this amount the percentage should have been allowed; the amount so allowed to bear interest at seven per cent. from the day last mentioned. But, had this been done, the sum adjudged to be due the Crane Company would have been more than that found in the judgment. It is probably the law that an account consisting of items of debit and credit is an unliquidated, running account, which will not carry interest, without an agreement express or implied. But, from the time of the last item on the debit side of such an account, it must be regarded as closed, and that there is an implied agreement to pay interest on the balance due thereafter.

No other questions need special consideration. That part of the judgment appealed from and herein held erroneous is set aside, and, on remittitur being filed, the court below will proceed to ascertain and determine the amounts due to plaintiff and the inter-

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venor Webb in accordance with the rules herein laid down, for which amounts judgment may be ordered.

MITCHELL, J.

In concurring in the result, I wish merely to say that if the word "indebtedness" admits of more than one construction, according to the subject-matter in contemplation at the time, I think evidence of extrinsic facts would be admissible for the purpose of aiding the court in arriving at the meaning in which the word was used in the written contract; but evidence of antecedent or contemporaneous oral communications between the parties is not admissible for any such purpose. The latter was the character of the evidence offered by the appellant. Moreover, it had no tendency to show in what sense the parties used the word "indebtedness." Its only effect was to prove that, in their antecedent or contemporaneous negotiations, it was agreed that this particular item of indebtedness was to be excluded. I also think that the transaction between appellant and the Mendenhalls amounted, in legal effect, to nothing more than a loan of money by the former to the latter on the security of the property conveyed, and I prefer to dispose of the question of ultra vires on that ground.

THOMAS E. CANNON v. DANIEL MOODY.

November 15, 1899.

Nos. 11,778—(39).

Dissolution of Firm—Contract to Pay Debts—Parol Evidence.

Where, upon the dissolution of a co-partnership, a written contract is entered into between the co-partners, in which one agrees to pay the firm liabilities, it is not an infringement, upon the rule that parol evidence is not admissible to vary, alter, or contradict the terms of a written instrument, to show, by parol, that a certain claim or demand was an indebtedness of the firm.

Charge to Jury—Verbal Inaccuracy.

A verbal inaccuracy in the charge of the court *held*, if error, to be without prejudice.

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Action in the district court for Clay county to recover $717.49 and interest on account of an indebtedness of a partnership formerly existing between plaintiff and defendant, which indebtedness the complaint alleged defendant had assumed. The case was tried before Baxter, J., and a jury, which rendered a verdict in favor of plaintiff for $663.70; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

C. A. Nye, for appellant.

F. H. Peterson, for respondent.

COLLINS, J.

Plaintiff and defendant were co-partners in a mercantile business, and commenced negotiations looking towards a dissolution, in which plaintiff made an offer to buy or sell for a stated sum of money, the purchaser to assume and pay all existing firm indebtedness. Defendant agreed to sell to plaintiff on the terms proposed. At that time the firm was indebted in the sum of $700 and interest on a promissory note past due, and payable to one Hill. The latter was urging payment, and plaintiff, supposing he was to continue the business for himself, and under the agreement was to pay all of the firm indebtedness, took up the Hill note by executing and delivering his individual obligation for $600 to Mr. Hill, and by paying the balance in cash, $113.49. Subsequently defendant declined to sell, as he had agreed to do, and a few days afterwards plaintiff sold out his interest in the firm assets to him; the bill of sale from plaintiff to defendant reciting, among other things, and as a partial consideration therefor, that defendant assumed and agreed to pay all of the firm debts and liabilities. He refused to pay the $600 note. Plaintiff was compelled to pay it, and then instituted this action, claiming that the amount of the Hill note was a firm liability, which defendant had assumed and agreed to pay.

Some of the assignments of error go to the admission of evidence as to what was said in respect to this note at the time the sale was consummated and the bill of sale executed and delivered, counsel for defendant insisting that evidence tending to show that defendant then knew that plaintiff had paid a part of the firm note in cash; had substituted his own note for the balance; that he then admitted

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the last-mentioned obligation to be a firm liability; that it was well understood to be between the parties; and that the full amount due upon the firm note, when plaintiff took it up, was taken into account when the sale was completed,—was a flagrant violation of that rule which forbids the introduction of parol proof to alter, vary, or contradict the terms of a written instrument, the instrument in question being the bill of sale.

Counsel is in error when contending that the testimony objected to had a tendency to alter or vary or to contradict that part of the bill of sale in which it was stipulated that his client should assume and pay the firm debts. It merely tended to show that plaintiff's note to Hill was a firm debt, that it was so understood by all parties at the time of the final settlement, and that defendant agreed to pay it because it was a firm debt. The testimony objected to served to establish the amount represented by the $600 note as a firm liability, and therefore within the terms of the bill of sale. The subject-matter involved in the writing was the debts of the firm, and this evidence was introduced to identify the claim as of the subject-matter. Its introduction was no infringement of the rule relied upon by counsel (see 1 Greenleaf, Ev. [16th Ed.] § 288, note 4); and, as a matter of law, there being no dispute over the facts, the $600 claim was a firm debt, as between the plaintiff and defendant. It was a part of the firm indebtedness when plaintiff substituted his note for that of the firm. Such substitution made it no less a firm debt as between these parties.

The further point is made that the court erred when charging the jury that the action was brought upon the note given by the firm to Mr. Hill for $700, and that, if plaintiff was entitled to recover at all, the verdict should be for $700, and interest at seven per cent. from the date of the note. It seems that there was a verbal inaccuracy in the charge, for the action was really based upon the $600 note. It was admitted by plaintiff on the trial that the cash payment of $113.49 made by him to Hill had been accounted for and paid by defendant on the final settlement. No claim for reimbursement was made for that sum. And the jury fully understood the plaintiff's claim, on what facts it was based, and the amount claimed. This was established by the verdict, which was for $600,

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and interest thereon from the date of the substituted note. If the court made a mistake when stating upon what note the action was brought, it resulted in no injury, and was error without prejudice.

Order affirmed.

PAULINE POEHLER v. FREDERICK REESE and Others.

November 15, 1899.

Nos. 11,797—(69).

Land Contract—Tender by Third Person—Notice—Tenants in Common.

At the time of her death R. was in possession and actually occupying a tract of land under a written contract with P. for its purchase. She had made valuable improvements, had paid taxes, and also interest on the purchase price, for a number of years. On March 25, 1898, P. caused notice to be served on the heirs at law, five children of the deceased, three of whom were minors, that, as provided in the contract, she had elected to and did declare the same null and void because of a failure to pay, unless the amount due on the contract was paid to her on or before May 10 following. April 12 one Johnson, who had succeeded by virtue of a deed of conveyance to the interests of the two heirs who had attained their majority, tendered to P. the full amount due, and demanded a deed of the land subject to the contract. *Held*, that this was a tender sufficient to put P. on inquiry as to Johnson's right to make the tender, and was sufficient to protect his own interests, as well as those of his tenants in common, the minor heirs of R.

Trial—Objection to Evidence of Tender—Pleading.

Immediately after May 10, P. took possession of the land, and commenced an action to determine adverse claims, making Johnson and the heirs at law defendants. Johnson answered, setting forth his equities and the tender, and demanding possession and specific performance by conveyance to himself. At the trial of the issues made between P. and Johnson, counsel for the former objected to the introduction of testimony tending to show that, when making the tender, Johnson notified P. of his rights under the deed and produced it for her inspection, on the ground that it was inadmissible under the pleadings, there being no allegation in the answer of such notification or offer of the deed for inspection. The court overruled the objection, received the evidence, and made a finding of the fact. *Held* that, if it was error to receive the testimony, it was error without prejudice, and that the finding based thereon was imma-

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terial; and, further, that as the objection, based on the omission in the answer, was taken at the trial for the first time, and not by proper pleading, it should not now be sustained.

Minor Defendants—Judgment Irregular—Estoppel of Party Responsible.

After the trial of the issues made by the complaint, Johnson's answer, and plaintiff's reply, counsel for the latter served notice, and obtained the appointment of guardians ad litem for the minor defendants, and advised the trial court of such proceedings. An answer was then filed in behalf of two of these defendants, but of this the court had no knowledge when it made findings of fact, in which it was recited that all of the defendants except Johnson were in default. By its conclusions of law, the court ordered that judgment be entered directing plaintiff to convey the premises by deed in which defendant Johnson and the minor heirs should be named as grantees, and reciting which one of said grantees paid the consideration therefor. The proceedings were irregular as to the minors, but, as plaintiff's counsel was responsible therefor, it is *held* that they cannot urge these irregularities as a ground for reversing a judgment entered in accordance with the conclusions of law.

Rental Value—Finding.

Testimony that the fair rental value of a tract of land for a specified year is a certain sum will not support a finding of fact that the rents, issues, and profits of the tract for that year were the sum stated.

Action in the district court for Sibley county to determine adverse claims. The case was tried before Cadwell, J., who found in favor of defendants; and from a judgment entered pursuant to the findings, plaintiff appealed. Modified.

S. & O. Kipp, for appellant.

W. H. Leeman and *H. J. Peck*, for respondents.

COLLINS, J.

The principal facts in this case are that plaintiff, being the owner of a quarter section of land, entered into a written contract with Sophia Reese, a married woman, in 1884, for the sale and conveyance thereof to Mrs. Reese, her heirs and assigns, upon the payment of the agreed purchase price on or before five years thereafter. Mrs. Reese, with her family, took possession of the land, made valuable improvements, paid taxes and interest, and resided thereon when Mrs. Reese died, in March, 1886. She left surviving a husband and five children as her heirs at law. Payments of interest

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in full seem to have been made up to March 1, 1893. On March 25, 1898, the plaintiff served upon the children and heirs of Sophia Reese, deceased, a written notice that she should declare the contract void, unless she was paid, on or before May 10, 1898, the sum of $1,980.03, and interest at eight per cent. per annum from March 1, 1893. Mr. Reese was then dead. Two of the children were then of age; the others were infants.

The children of age, William and Sophia Reese, sold, and by quitclaim deed conveyed, all of their title and interest in the land to defendant Johnson, April 5, 1898; this deed being duly recorded June 11 of that year. April 12 Johnson called upon plaintiff at her residence, and then and there tendered and offered to pay her the full amount due upon the Reese contract, and demanded that she execute and deliver, subject to the contract, a warranty deed of the premises, in which he should be named as sole grantee. The plaintiff stated that she would consult her business adviser and follow his advice. A few days later she executed and caused to be tendered to defendant Johnson a warranty deed, conveying the land to the "heirs of Sophia Reese, deceased." This deed Johnson declined to receive, on the ground that his own name should appear therein as sole grantee.

The plaintiff seems to have taken possession of the premises in the month of June, 1898, and to have commenced this action to determine adverse claims at once. The complaint was in the usual form. Defendant Johnson answered setting up the contract with Mrs. Reese; her possession thereunder; the making of improvements; the payment of taxes and interest; the deaths of Mrs. Reese and her husband; the service of the notice upon the heirs at law; the sale and conveyance of their interest in the land by the adult children; a statement of the amount due on April 12, 1898; that the amount was duly tendered to plaintiff on that day; the demand then made by defendant Johnson; and plaintiff's refusal to execute and deliver a deed to him or otherwise. This answer demanded the execution and delivery of a deed in accordance with the terms and conditions of the contract, a copy being attached. The reply practically admitted all of the allegations in the answer which we have

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mentioned, and the plaintiff and answering defendant proceeded to a trial by the court without a jury.

It is conceded that at this time it had not been suggested to the trial court that three of the heirs at law were minors, although an affidavit of nonappearance and of no answer on the part of each and all of the defendants, except Johnson, had been made and filed. Soon afterwards, and prior to the making of findings of fact and conclusions of law, plaintiff's attorney filed an affidavit, gave notice of the application, and obtained the appointment of guardians ad litem for these minors. Thereupon two answered, through the attorneys for defendant Johnson, setting up substantially the same defense, and demanding the execution and delivery of the deed to defendant Johnson. The other minor failed to answer. The court then found the facts, and ordered judgment, which was entered, that on the payment of the amount due on the contract, less the sum of $300, to which we shall hereinafter refer, the plaintiff should execute and deliver to the defendant Johnson, and to the three minors (naming each as a grantee), a good and sufficient deed of the land in controversy, wherein it should be recited which of said grantees paid the consideration. Immediate possession was awarded to said defendants. The disbursements were to be paid by the parties in equal shares. The appeal is by plaintiff from the judgment.

1. There was no allegation in the answer of defendant Johnson that he informed plaintiff, or that she had any knowledge at the time of the tender, of his rights or interests in the land, or that she was then notified that he had, by deed of conveyance, acquired such interests in the property as were held by the two adult heirs. So, when counsel for Johnson attempted to prove that plaintiff, at the time of the tender, was informed of the fact, and the deed was produced for her inspection, an objection was made on the ground, among others, that the evidence was inadmissible under the pleadings. The objection was overruled, evidence of both facts received, and the court found that, when making the tender, Johnson informed plaintiff of the conveyance, and then and there exhibited the deed to her. This ruling is assigned as error. We are of opinion that the ruling should be upheld.

The contract contained a clause which provided for prompt pay-

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ment, and a strict and literal compliance with all of the terms and conditions to be kept and performed by the vendee, time of payment being made of its essence, and, in case of default or failure, giving to the vendor the right to declare the contract null and void. It was this clause which caused plaintiff to serve a forfeiture notice on the Reese heirs, requiring them to pay the money due on or before May 10. Within 30 days after May 10, she instituted this litigation, by bringing an action to determine adverse claims, making Johnson one of the defendants. His rights and equities were set up in his answer. From this pleading it appeared that, prior to the tender, Johnson had by quitclaim deed succeeded to the title and interest of two of the heirs at law, and had thus become a tenant in common with the other heirs. His right to protect himself as such tenant, by making a tender of the entire sum due, was plainly shown. In no other manner could he guard his two-fifths interest or secure his rights. The plaintiff was not obliged to accept less than the whole amount, and this Johnson had offered to pay, according to his answer, and as admitted in the reply. It was payment of this sum which had been demanded by service of the notice a few days prior to the tender. It appears that Johnson informed plaintiff, at the time he offered the money, that it was upon the contract, the full amount due on the same, and that his demand was for a deed in compliance with, and subject to, the conditions of the contract itself.

Now, in view of the notice, and the prompt appearance of defendant Johnson with the amount of money required to liquidate plaintiff's claim on the land, and the fact that his demand was for a deed subject to the conditions of the contract, it is obvious that plaintiff either knew, or should have known, that Johnson was acting for the heirs, as the equitable owners of the land, or that he had an interest which he was endeavoring to protect; and that she did understand that he was not an intermeddler when making the tender; and that she regarded it as made in behalf of the proper parties, is evidenced by the fact that within a few days she offered to deliver to Johnson personally—not to the children—a deed in which the heirs were named, generally, as grantees. Taking into consideration the fact that plaintiff herself instituted the litigation, almost

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immediately after the expiration of the period fixed in her notice within which payment was demanded, making Johnson one of the defendants, and thus inviting him to set up his claim for specific performance, his answer, although omitting to state that plaintiff was informed as to what rights and interests he had in the property, contained allegations upon which equitable affirmative relief could be awarded to him and to his co-tenants, the minor children of Mrs. Reese, unless we are to give undue and unjust weight to an omission in the answer more of a technical than of a material nature.

It is also to be observed that, while time of payment was made of the essence of the contract, it was therein provided that, in case of default, the vendor should have the right to declare the same null and void. If this is to be construed as requiring that she must exercise the right by giving notice, the fact that time of payment was declared to be of the essence of the contract is of little value in this proceeding. See Coles v. Shepard, 30 Minn. 446, 16 N. W. 153; also Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14. If this be not the proper construction, and notice was unnecessary, it is apparent that she waived her strict rights by serving the notice. And, in compliance with her demand, the full sum due was tendered under circumstances which clearly indicated that Johnson was not meddling with that which did not concern him, but, on the other hand, was acting either for the heirs at law, some of whom were minors, or to protect interests of his own, or in both capacities. Under all these circumstances, it would be inequitable to hold, when considering Johnson's right to enforce specific performance for his own benefit, as well as for the benefit of his tenants in common, that the tender was insufficient, even if he did fail to inform plaintiff of the exact relations he held to the land and to the heirs at law of Mrs. Reese, the vendee named in the contract, who had in her lifetime actually occupied and cultivated the land, made valuable improvements on the same, paid taxes, and interest on the contract, for several years.

Taking this view of the effect of the tender, it is apparent that the plaintiff was not prejudiced by a finding that plaintiff was informed of the deed, and that it was exhibited to her. Such a finding becomes immaterial. It is also apparent that, if the court erred when

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receiving evidence as to the exhibition of the deed to plaintiff, it was not at all prejudicial. And, in any event, the objection based on the omission in the answer was taken for the first time at the trial, and not by proper pleading, and for that reason should not now be sustained. Nor can the plaintiff complain of the form of the decree, for in it her own rights, as well as those of the minor heirs, have been fully and adequately protected. That in so doing the court disregarded the contention of defendant Johnson as to his right to be designated in the deed and decree as sole grantee, and then fully protected the minors, is no ground upon which to base an order of reversal.

2. It is obvious that, as to the three minor defendants, the proceedings were irregular. If the court had been informed at the time of the trial of their status, it could have dismissed as to them, or could have suspended proceedings until steps were taken to have them properly represented. But, after the case had been submitted on briefs, plaintiff's counsel discovered the situation, and procured the appointment of guardians ad litem. This step was made known to the court. Afterwards two of the minors made answer through their guardian. It seems that this fact was not brought to the attention of the court, for in its findings it was recited that all of the defendants, save Johnson, were in default. But, notwithstanding this, specific performance was ordered in their behalf, and for possession, and for three-fifths of the rents, issues, and profits for the year 1898.

Counsel for plaintiff urge that, as they were in default, it was error to grant them any relief. There are several reasons why the claim is unavailing. That part of the judgment in which the interests of these minors have been guarded, as against defendant Johnson, is not prejudicial to plaintiff; for it is wholly immaterial to her what steps were taken by the court when considering the rights of defendants, as between themselves. Nor were two of these minors in default, for they had made answer. Again, the error, if there was one, was that of plaintiff's counsel. The omission to secure the appointment of guardians ad litem for the minor defendants before proceeding to trial was a defect for which plaintiff's counsel were responsible, not the court. And the responsibility was again with

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counsel when they failed to advise the court that two of these minors had appeared, and had filed answers, after the trial, but before findings had been made; and this failure on the part of counsel led to what was an erroneous recital in the findings as to the default. The judgment appealed from ought not to, and cannot, be reversed, simply because of irregularities for which appellant's counsel are to blame.

3. In his answer Johnson set up a substantive cause of action for specific performance, demanding possession of the premises, among other things. He alleged that plaintiff's possession was acquired wrongfully and by force. At the commencement of the trial, December 27, 1898, he was allowed to file a so-called "supplemental answer," in which it was averred that the plaintiff had received the rents, issues, and profits of the premises during the year 1898, of the reasonable value of, and worth, $300, for which he asked to recover. If defendant Johnson was entitled to possession during the year 1898, and had been deprived thereof by plaintiff, he was entitled to recover in this action (Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676), and there was no error in permitting the supplemental answer to be made. The court found upon the evidence that the rents, issues, and profits were the sum of $300, and ordered that this sum be deducted from the amount to be paid the plaintiff. Judgment was so entered. But this finding is, as asserted by plaintiff's counsel, unsupported by the proof. It was wholly based upon the testimony of one witness that the "fair rental value" of the land for 1898 was $300. Proof of the fair rental value of the premises will not support a finding as to the value or worth of the rents, issues, and profits. To this extent the conclusion of the trial court was wrong.

It is therefore ordered that, in so far as the judgment fixes and determines that the rents, issues, and profits of the land for the year 1898 were the sum of $300, and that this sum be deducted from the amount due on the contract, it is set aside; and on the question of the value of the possession for the year 1898 a new trial is hereby ordered.

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FRANK A. SEYMOUR and Another v. HAZEN J. BURTON.

November 15, 1899.

Nos. 11,848—(50).

Insolvent Bank—Promissory Note—Principal and Agent—Corporation—Evidence—Set-Off.

In an action by the receivers of an insolvent bank against a defendant on his promissory note, he sought to show that he gave the note as agent for a certain corporation, of which he was the president, and for its debt. *Held*, that the evidence adduced upon the trial warranted, even if it did not absolutely require, the court to find what it did, in effect, find,—that the defendant was the principal debtor upon the note, and that if said corporation, whose money, on deposit in the insolvent bank, the defendant was attempting to have applied as a partial offset, had assumed any obligation in respect to payment of the note, it was that of a surety. And *held*, further, that this evidence would not have been affected, had the court allowed counsel for defendant to pursue their inquiries along certain lines indicated by questions propounded to their witnesses, and objected to by counsel for plaintiff.

Action in the district court for Ramsey county by plaintiffs as receivers for the Bank of Minnesota to recover $2,500 on a promissory note. The case was tried before O. B. Lewis, J., who found in favor of plaintiffs; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Nelson & Bramhall, for appellant.

Young & Lightner, for respondents.

COLLINS, J.[1]

Defendant, in his answer, alleged that the note upon which this action was brought, as well as the note of which it was a renewal in part, was executed by defendant for and in behalf of the Plymouth Clothing Company, a corporation, of which defendant was president and principal stockholder, without consideration to him, and, further, that at the time of the execution it was well understood and agreed by the bank and said corporation that said note

[1] MITCHELL, J., absent, took no part.

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should be considered that of the corporation, and, also, that payment thereof was to be made by it, not by defendant.

Conceding, for the purposes of this case, that defendant, Burton, the maker of the note, could in this action have the benefit of an offset in a sum equal to the balance of the corporate deposit in the bank at the time its doors were closed, if he had supported these allegations by proof that in fact the corporation was the principal debtor, while he was nothing but a surety, and that this was agreed to by all of the parties, the proof was not made, and the evidence wholly failed to show that these were the relations between the defendant and the corporation. The evidence warranted, even if it did not absolutely require, the court to find (what it practically did find) that defendant was the principal debtor, and, if the corporation had assumed any obligation at all in respect to the note, it was that of a surety.

One Drew was a witness for defendant. He was the treasurer of the corporation, and had transacted all of the business with the bank concerning the $5,000 note, of which the note in suit was a renewal in part, and also all business with reference to a partial payment, and a renewal for the balance. From his testimony it appeared that, when the larger note was discounted at the bank, defendant owed the corporation over $40,000 on book account; that the proceeds of this $5,000 note were credited to the deposit account of the corporation at the bank, and were also credited to defendant on the book account before mentioned. When the note matured, $2,500 was paid thereon by the corporation, and at once charged to defendant in his account. It was not clearly shown whether defendant paid the interest at the bank with his personal check, or the payment was by the corporation. But, if paid by the latter, the amount was charged to defendant on account, so that he paid the interest on the note, not the corporation. And this larger note, as well as the renewal, was secured by the hypothecation of shares of stock in the corporation issued to and owned by defendant, of the par value of $18,500. This evidence was not contradicted or affected in any manner at the trial; nor would it have been if defendant's counsel had been allowed to pursue their inquiries along the

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lines indicated by questions asked by them, objected to by opposing counsel, and held immaterial and incompetent by the Court.

It is quite apparent from this evidence that, when the $5,000 note was discounted, defendant's indebtedness to the corporation was being partially paid by borrowing money at the bank, as it had been before, and that when the note matured it was to be taken care of by the corporation, as had theretofore been the custom, if defendant did not look after it himself. The corporation was not the principal debtor, and as between all of the parties the note was primarily defendant's debt. The treasurer of the corporation did all of defendant's work in respect to discounting his notes, and the account thereof was kept on the books of, and they were cared for by, the corporation, when due, more for defendant's accommodation than for any other purpose.

These views seem to render it unnecessary further to consider the record, but it is not out of place to suggest—First, that the trial court found as a fact that the plea of former adjudication of the claim of right of set-off made by defendant in his answer was true, and this finding is not assailed by any assignment of error; and, second, that without attempting to make the corporation, having the deposit in the bank when the latter failed, a party to the action, defendant sought to appropriate its money to the partial payment of an obligation which, upon the face of it, was his individually. The mere fact that he was president of, and the principal stockholder in, the corporation, would not justify such an appropriation, without notice.

Order affirmed.

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J. J. LE TOURNEAU v. BOARD OF COUNTY COMMISSIONERS OF AITKIN COUNTY.

November 15, 1899.

Nos. 11,907—(51).

Motion for New Trial—G. S. 1894, § 5399.

That part of G. S. 1894, § 5399, which provides that a motion to set aside a verdict and for a new trial, made upon the minutes of the court, or upon the minutes of the stenographic reporter, "can only be heard at the same term or court at which the trial is heard," is imperative. After the term ends, the court has no right, as against the objection of counsel, to hear and determine such a motion.

Action in the district court for Aitkin county to recover $254.60 for services rendered. The case was tried before Holland, J., who found in favor of plaintiff; and from an order granting a motion for a new trial, plaintiff appealed. Reversed.

John Rustgard and *McGiffert & Hunter*, for appellant.

F. E. Ebner, for respondent.

COLLINS, J.

This action was tried at the October term for 1898 of the district court for Aitkin county, a jury trial having been waived. After the term had ended, and on December 27, the court filed its findings, with an order for judgment in favor of the plaintiff. Judgment was entered on the same day by consent of the then county attorney. January 11, 1899, the present county attorney gave written notice of a motion for a new trial on the grounds mentioned in the fifth and seventh subdivisions of G. S. 1894, § 5398, to be heard at the court chambers in the city of Brainerd, Crow Wing county, "on the minutes of the court, the minutes of the stenographic reporter, the files, records, and proceedings," and certain affidavits. At the time and place fixed by the notice, plaintiff's counsel appeared specially, and objected to a hearing of the motion, on the grounds that the court was without authority to set aside its findings and decision upon a motion made as this was; and also that it could not entertain such a motion at its chambers in another county; and, further, that it was not authorized, under the statute, to hear and determine

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such a motion after the term of court had ended at which the cause was heard and tried. These objections were overruled, the motion was argued on the merits, and the court vacated and set aside the judgment, and ordered a new trial.

It is to be regretted that this action on the part of the trial court cannot be upheld. But the statute (G. S. 1894, § 5399) is very plain. Its provisions are imperative, and cannot be evaded. It is expressly provided that a motion for a new trial, made upon the minutes of the court or on the minutes of the stenographic reporter, "can only be heard at the same term or court at which the trial is heard." After the term ended in Aitkin county, the court had no right, as against the objection of counsel, to hear and determine the motion in question. Its subsequent action was therefore erroneous. Nothing further need be said.

Order reversed, but, in view of all the circumstances, no statutory costs will be taxed against the defendant.

RANSOM J. POWELL v. HENRY R. KING.

November 15, 1899.

Nos. 11,919—(199).

Re-enactment of Statute—Intermediate Amendment—Redemption from Tax Sale.

The rule that a later law which is merely a re-enactment of a former does not repeal an intermediate act which has qualified or limited the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first, applied to Laws 1899, c. 35; and *held*, that this enactment did not affect or repeal the proviso found in G. S. 1894, § 1654, which requires that notice to redeem must be given or served, where lands forfeited to the state at tax sales have been deeded, before the purchaser from the state acquires absolute title.

Agreed case submitted to the district court for Hennepin county in accordance with the provisions of G. S. 1894, §§ 6083, 6084. The court, McGee, J., found that defendant was owner in fee of the land

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in controversy; and from a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Ransom J. Powell, pro se.

Geo. K. Belden, for respondent.

COLLINS, J.

Defendant has the patent title to the tract of land in controversy, while plaintiff asserts ownership thereunto by virtue of a tax deed issued to him in August, 1899, in accordance with the provisions of G. S. 1894, §§ 1616, 1617, as the last-mentioned section was amended by Laws 1899, c. 35. The single question argued is whether such a deed conveys an estate in fee simple of the land therein described, without any other act or proceeding whatsoever, or is it still necessary that the notice to redeem provided for in G. S. 1894, § 1654, be served or given.

It is the contention of plaintiff's counsel that the law of 1899, which was a re-enactment of said section 1617, with an unimportant change as to the disposition of the proceeds of a sale by the state for less than the amount due as taxes, operated to repeal that part of section 1654 which requires the giving or serving of notice to redeem in all cases arising under the provisions of sections 1616, 1617. Prior to 1889 the requirement as to notice to redeem, now the proviso found in section 1654, was no part of our statute, and notice was unnecessary. State v. Smith, 36 Minn. 456, 32 N. W. 174. This provision was enacted by Laws 1889, c. 198. It was nothing but a limitation or qualification upon the previously existing law. It modified the latter. State v. Bigelow, 52 Minn. 307, 54 N. W. 95. Laws 1899, c. 35, being simply a re-enactment of section 1617, we apply the sound and settled rule that a later law which is merely a re-enactment of a former does not repeal an intermediate act which has qualified or limited the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first. Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614.

If this were not the rule, the door would be opened for the repeal by implication of many of our most salutary statutes. What evils might be unadvisedly and unconsciously wrought in that direction

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is well illustrated in this case. We have heretofore mentioned that counsel have presented but one question. The power of a legislature to affect the rights of persons whose lands have already been forfeited to the state, and who are entitled to the statutory notice, by the repeal, direct or otherwise, of the proviso in section 1654, has not been considered.

Judgment affirmed.

ANNA L. STEWART v. ST. PAUL CITY RAILWAY COMPANY.

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November 17, 1899.

Nos. 11,744—(64).

Street Railway—Stopping Car for Passenger.

While a street-car company is not responsible for the condition of the streets on which it operates its cars, yet it is bound to exercise reasonable care to stop its cars for the discharge of passengers at a safe and proper place for that purpose.

Personal Injury—Notice of Hole in Street.

Evidence *held* sufficient to justify the jury in finding that the defendant was chargeable with notice of a certain hole in the street, and was negligent in stopping its car in such close proximity to it that a passenger, in alighting in the dark, was liable to step into it.

Action in the district court for Ramsey county to recover $3,500 damages for personal injuries. The case was tried before Bunn, J., and a jury, which rendered a verdict in favor of plaintiff for $300; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Munn & Thygeson, for appellant.

S. P. Crosby, for respondent.

MITCHELL, J.

This action was brought to recover for personal injuries alleged to have been sustained by the plaintiff by stepping in the nighttime into a hole in the street while alighting from one of defendant's cars. The negligence charged against the defendant consisted in its stopping its car at an unsafe place for plaintiff to alight in the

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dark. Her contention was that the hole was in such close proximity to the steps of the car that she stepped into it when in the act of alighting from the car. On the other hand, the defendant's contention was that the evidence as to the location of the hole conclusively showed that this was a physical impossibility; that plaintiff must have stepped into the hole after she had safely alighted from the car and taken several steps along the street, and that it is not responsible for the condition of the streets.

A street-railway company is not responsible for the condition of the streets on which it operates its cars, but it is bound to exercise proper care to stop its cars for the discharge of passengers at a safe and suitable place for that purpose. The evidence as to the length of time this hole in the street had existed, and the length of time the defendant had been accustomed to stop its cars at this same place, was sufficient to justify the jury in finding that the defendant knew, or in the exercise of reasonable care ought to have known, of the existence of the hole. Its character was such as to justify the jury in finding that the defendant was guilty of negligence in stopping its car for the discharge of passengers in such close proximity to it that passengers would be liable to step into it while in the act of alighting, at least in the dark. While the evidence introduced by defendant tending to show that the hole was not so near the car steps that plaintiff could have stepped into it while alighting was quite strong, yet it was not conclusive. The question was one for the jury. There was no evidence that the plaintiff was guilty of contributory negligence, and the court was correct in so charging the jury. We find no error in the record.

Order affirmed.

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ANNA FLOHRS v. GEORGE W. FORSYTH.

November 17, 1899.

Nos. 11,751—(75).

Justice of the Peace—Attachment against Nonresident—Jurisdiction.

In an action in justice's court commenced by attaching the personal property of the defendant, the defendant residing in another county in the state, the summons may be served upon him personally in the county of his residence, and such service gives the justice jurisdiction to render a judgment which will be valid, at least to the extent of the property attached. G. S. 1894, § 5056.

Action in the district court for Watonwan county to recover $200 damages for conversion. The case was tried before Severance, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

W. L. Lamb and *W. S. Hammond*, for appellant.

Ashley Coffman, for respondent.

MITCHELL, J.

This was an action for the wrongful conversion of a span of horses which were at the time the property of one John Flohrs, who assigned his claim to his wife, this plaintiff.

The short facts are that in an action brought in justice's court in Watonwan county by one Coffman against John Flohrs, for the recovery of money, an attachment was issued and delivered to the defendant, as sheriff of the county, who thereunder seized the horses in question in that county, and, after judgment was rendered against Flohrs, sold them on execution to satisfy the judgment. These acts constitute the wrongful conversion complained of. The claim of the plaintiff is that the judgment was absolutely void, because the justice had no jurisdiction to render it. The justice's docket shows that the defendant certified, in his return to the writ of attachment, that he had attached the span of horses here in controversy, but that, after diligent search, the defendant, Flohrs, could not be found in Watonwan county; that the action was adjourned one week for the purpose of serving the summons on the

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defendant; that, on or before the day to which the case was adjourned, a constable of Martin county returned the summons, with a certificate indorsed that he had served the summons on Flohrs by leaving a true copy thereof with one Anna Flohrs, a person of suitable age and discretion, at his last usual place of abode in Martin county. The docket further showed that Flohrs did not appear on the day to which the cause was adjourned, and upon which the action was tried and judgment rendered.

This is all that the docket of the justice or the files in the case shows as to the existence or nonexistence of the jurisdiction of the justice. The parties, however, stipulated on the trial that the summons was duly served on Flohrs, in so far as the manner of actual service by the constable is concerned, if it was proper to serve it at all in Martin county. The service in this case was in exact accordance with the provisions of the last clause of G. S. 1894, § 5056, and gave the justice jurisdiction, at least, to render a judgment in rem valid to the extent of the property attached. The provision that, in such cases, the summons shall be served as a summons is served under like circumstances in the district court, has reference, in our opinion, to the manner of service, and not to the proof of service; and we do not see why the certificate of the constable is not sufficient, although not under oath. But, in any event, it is the fact of service, and not the proof of it, that confers jurisdiction, and in this case actual service is admitted. Some other technical points are made, but none of them are entitled to special notice.

Order affirmed.

R. B. BEESON v. GEORGE J. DAY and Others.

November 17, 1899.

Nos. 11,758—(101).

Bond—Foreclosure of Mortgage—Bank—Findings Sustained by Evidence.

Held, that the findings of fact and decision of the trial court are sustained by the evidence.

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Action in the district court for Nobles county against George J. Day, Martha E. Day, his wife, and Peter Thompson to foreclose a mortgage executed by defendants Day to secure a bond of guaranty executed by defendant George J. Day. The case was tried before P. E. Brown, J., who found the facts as stated in the opinion, and as conclusions of law found that there was due on the bond and mortgage $2,372.17, with interest from September 5, 1888, and that plaintiff was entitled to judgment of foreclosure. From a judgment entered pursuant to the findings, defendant Thompson appealed. Affirmed.

Daniel Rohrer, for appellant.

Geo. W. Wilson & Son, for respondent.

START, C. J.

The facts of this case as found by the trial court are these: In the year 1886 the defendant George J. Day contemplated establishing a national bank at Worthington, this state. For the purpose of inducing a syndicate, which was represented by George S. Capelle, as trustee, to subscribe for 350 shares of the capital stock of the proposed bank, he executed to Capelle, as such trustee, his bond in the sum of $35,000, the condition of which, after reciting that the syndicate had subscribed for the amount of stock named, read as follows:

"I, Geo. J. Day, do hereby guaranty and insure to the holders of said stock annual dividends or returns upon said stock at the rate of 10 per cent. per annum; and, when the said stock can be disposed of and sold for $125 per share, then this bond shall be void and of no effect, and otherwise shall remain in full force."

Day and wife, to secure the performance of the condition of the bond, executed to Capelle a mortgage on the real estate described in the complaint in this action, which was then owned by Day. The mortgage was duly recorded in the proper county July 24, 1886. The syndicate subscribed and paid for the 350 shares of the stock, and 150 shares thereof were subscribed by other parties, and thereafter, and on October 1, 1886, the bank commenced business as the First National Bank of Worthington. The defendant Day was elected cashier of the bank, and so remained while the bank existed,

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but there was no agreement between him and Capelle or any of the beneficiaries in the bond that he should be made and kept cashier of the bank, and have the management or control of its affairs.

The defendant Peter Thompson, on July 30, 1888, commenced an action against Day and others to establish and enforce a lien in his favor upon the land described in the complaint and other lands. Due notice of the pendency of this action was recorded, and such proceedings were had therein that judgment was entered in favor of Thompson establishing a lien thereon in his favor as of February 13, 1888. The bank paid to its stockholders dividends of 10 per cent. per annum to January 1, 1888.

Prior to September 5, 1888, it was insolvent, and on that day it went into liquidation, and George S. Capelle, George W. Bush,—two of the members of the syndicate,—and the defendant Thompson were duly appointed commissioners in liquidation. Thereafter the commissioners, together with all of the stockholders of the bank, and the beneficiaries in the bond and mortgage securing it, entered upon negotiations with Day for a settlement of all the affairs of the bank and the alleged liability of Day on his bond, in which it was claimed that he was indebted to the bank and to the syndicate on his bond, and to certain other stockholders of the bank. Pending the negotiations, and before any final settlement was made, Thompson withdrew therefrom, and refused to longer act as a commissioner in liquidation, and advised all parties that he should insist upon all his rights in his action against Day, then pending. The remaining parties to the negotiations proceeded, and made a settlement with Day, whereby he agreed to convey the premises described in the complaint, and turn over to the commissioners in liquidation, the trustee of the syndicate, and the stockholders a large amount of money, property, and choses in action in full settlement of all claims held by them or either of them against him. The conditions of the settlement were performed by Day. The land in question was, on November 15, 1889, conveyed by Day and his wife, by warranty deed, to George W. Bush, at the request of Capelle, instead of himself, in order to preserve the lien of the mortgage to him as trustee to secure Day's bond, and to prevent a merger of the mortgage, and thereby partially protect the interests of the parties in case Thomp-

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son's action against Day was finally decided in favor of the former. Except as here stated, Day never paid anything on his bond and mortgage to Capelle.

Thereafter Capelle duly foreclosed by action his mortgage against Day, and he became the purchaser of the mortgaged premises at the sale on the judgment entered in the action on May 15, 1893. The sale was confirmed, and no redemption was made. Thompson was not a party to the foreclosure action. Afterwards Capelle and Bush conveyed the land to the plaintiff herein, and thereafter, and on July 6, 1896, the bond and mortgage of Day to Capelle were duly assigned, without merger, to the plaintiff. There was due on this bond and mortgage, September 5, 1888, when the bank went into liquidation, the sum of $2,372.17, no part of which has ever been paid.

Upon the facts found the trial court entered judgment of foreclosure and sale to pay the amount due on the bond, from which the defendant Thompson appealed.

If the findings of fact by the trial court are sustained by the evidence, its judgment is right. The defendant, however, claims that the finding of fact to the effect that the bond and mortgage securing it were given for the purpose of inducing the syndicate to subscribe for stock, as stated therein, and that they were not given in consideration that Day should be made and kept cashier of the bank, is not sustained by the evidence. On the contrary, he insists that the evidence demanded a finding that the bond and mortgage were coupled with an agreement between Day and the syndicate that the latter, if he made the bond and mortgage, should have the management of the business of the bank as cashier, and that, therefore, they are against public policy, and void. Whether this conclusion would be correct if the premises were true, we need not discuss or decide, for we are of the opinion that the finding of the trial court is sustained by the evidence. The only evidence on this point, aside from the bond itself, was that of George J. Day, which was substantially this:

"Q. You testified that this indemnity bond was made to Capelle, as trustee, to induce the persons named in it to subscribe this 350 shares. Was that so? A. Yes, the terms of the indemnity bond

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were agreed upon by Bush and Capelle while they were here, and afterwards made and sent to them. Q. Did you have any talk with Capelle about being cashier? A. I did. Q. What was said between you about it in connection with the bond? A. I said that, if I was to be responsible for the investments and dividends, I should want to have the management of the business of the bank. They said that would be all right; that would be nothing but fair. Q. This conversation between you and them about your being cashier was made in connection with the agreement to guaranty the dividends? A. It was."

This evidence does not require, as a matter of law, a finding to the effect claimed by the defendant. It is a fair inference from the evidence that Day expected that some pecuniary advantage would accrue to him by the establishment of the bank of which he was the promoter, and to induce the syndicate to embark in the enterprise he was willing to and did guaranty to its members a return on their investment of 10 per cent. per annum in the form of dividends. But there was no contract by the bank, or its directors, or its proposed stockholders that Day should be made and kept the cashier of the bank, without reference to his capacity or fitness for the place, so as to enable him to distribute to the stockholders 10 per cent. annual dividends, whether earned or not. The contract and purpose of the parties appear on the face of the bond, and they are as legitimate as would be the guaranty of a specified dividend made by a stockholder to a would-be purchaser to induce him to purchase the stock. The finding of the trial court in question is supported by the evidence, and the bond and mortgage are valid.

The defendant further claims that the finding that the bond and mortgage have not been paid or satisfied is not sustained by the evidence, but that, on the contrary, the evidence shows that the settlement had with Day was accepted in full satisfaction and payment of the bond and mortgage.

The evidence shows that the settlement of the parties was upon the basis that Day had a good title to the land he was to convey in part payment of the amount agreed upon, subject only to two mortgages, not here material. The lien of Thompson on the land was subordinate to that of the mortgage to the syndicate. If he had consented to release his lien, there would have been no occasion for

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keeping the first mortgage on foot; but he refused to do so, and withdrew from the settlement. Consequently it was necessary to preserve the lien of the mortgage as against him, and the evidence amply sustains the conclusion that it was the intention of all of the parties to the settlement that Capelle, as trustee of the mortgage, should remain in the same position as to enforcing the mortgage against the land as he was before the settlement, and that, for the purpose of effectuating this intention, the land was conveyed to Bush to prevent a merger of the mortgage. Capelle then proceeded to foreclose the mortgage, and, after the expiration of the time allowed for redemption, he and Bush conveyed the land to the plaintiff. But for some reason, not disclosed by the record, Thompson was not made a party to the action to foreclose the mortgage; hence as to him the mortgage had never been foreclosed; and Capelle assigned it to the plaintiff, who brought this action against Thompson to foreclose the mortgage. We are of the opinion that the evidence sustains the finding of the trial court that the bond and mortgage have not been paid or satisfied as against Thompson.

The only other assignment of error meriting special consideration is that the court erred in finding that there was due on the bond and mortgage, on September 5, 1888, the day the bank ceased to exist except for purposes of liquidation, the sum of $2,372.17. Clearly, the defendant cannot complain of the finding, for the trial court seems to have made it upon the basis that all future liability on the bond was extinguished when the bank ceased to exist. The amount found due on the bond was simply the interest on the $35,000 from the date of the last dividend paid by the bank to the day it closed. It is immaterial whether this amount be designated as a dividend or interest, for in fact it was the guarantied return on the stock investment, which the syndicate were entitled to, by virtue of the bond, whether the bank paid dividends or not. This was the amount past due when the bond and mortgage were assigned to the plaintiff, and it is immaterial whether the stock was assigned to him or not.

Judgment affirmed.

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MARION C. ARMSTRONG v. CHARLES A. FREIMUTH.

November 17, 1899.

Nos. 11,769—(125).

Bill of Sale—Chattel Mortgage—Possession—Usury.

The intervenor herein, the owner of a piano, executed to W. an instrument which was on its face an absolute bill of sale of the piano, who sold it to the plaintiff. Evidence considered, and *held*, that it sustains the finding and decision of the trial court to the effect that the bill of sale was in fact a chattel mortgage to secure the payment of a usurious loan, that the intervenor retained the possession of the piano, and that he, and not the plaintiff, is the owner thereof.

Action in the municipal court of Duluth to recover possession of a piano and piano stool or to recover $350 in case a return could not be had. D. Van Baalen filed a complaint in intervention, alleging ownership of the property. The case was tried before Gearhart, special judge, who found in favor of the intervenor; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Thos. S. Wood and *Baldwin & Baldwin*, for appellant.

White & McKeon, for respondent.

START, C. J.

Action of replevin, the subject-matter of which is a piano and stool, which it is conceded were on July 9, 1898, the property of Van Baalen, the intervenor and respondent herein, and in his possession at his home, 218 Fourteenth avenue E., in the city of Duluth. The action was originally against the defendant, Freimuth, alone. The complaint alleged that the plaintiff was the owner and entitled to the possession of the property, but that the same was unlawfully detained from her by the defendant. The answer of the defendant denied the allegations of the complaint, and alleged that the respondent, Van Baalen, was the owner of the property. Thereupon the latter filed his complaint of intervention, alleging that he was, and had been for the past ten years, the owner of the property, and in possession thereof.

The facts found by the trial court were substantially these: On

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July 9, 1898, Mary M. Wellington loaned to the intervenor, Van Baalen, $125, upon the usurious agreement that he should repay the principal in 30 days, with $10 for the use thereof for that time. As security for the payment of such loan, Van Baalen then executed to Mary M. Wellington a bill of sale, in form, of the piano and stool in question, but which was in fact a chattel mortgage. The bill of sale was filed in the office of the clerk of the city of Duluth. Afterwards, and on February 25, 1899, Mary M. Wellington executed a bill of sale of the piano and stool to the plaintiff, Marion C. Armstrong. The defendant, Freimuth, never had possession of the piano and stool, or any right thereto, but the intervenor, Van Baalen, during all of the time herein mentioned was in the actual possession and control thereof.

The trial court, upon these facts, found, as conclusions of law, that the chattel mortgage was void, that the plaintiff was not the owner of the property, but that the intervenor was the absolute owner thereof, and directed judgment accordingly. The plaintiff appealed from an order denying her motion for a new trial.

1. The plaintiff claims that the finding of the trial court that the instrument executed by Van Baalen to Wellington, although in form a bill of sale of the property in question, was in fact a chattel mortgage to secure a usurious loan, is not supported by the evidence. The only witnesses having any knowledge of the transaction were Van Baalen and the agent of Mary M. Wellington, her husband. Their testimony was in direct conflict. The former gave testimony which, if credible, was ample to sustain the finding. The court necessarily found it true, and its finding cannot be disturbed by this court.

2. The main contention, however, of the plaintiff, is that the intervenor is estopped, as against her, to show that the bill of sale was a chattel mortgage to secure a usurious loan.

The rule is that if the owner of tangible personal property invests another with the indicia of an absolute title thereto, and the latter, while the property is in his actual possession, sells it to a third party, who, in good faith, without notice of any rights or equities of the real owner, pays a valuable consideration therefor, relying upon such possession and indicia of title, the owner is estopped from

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asserting his claim thereto as against such purchaser. Bigelow, Est. 560; Warder, Bushnell & Glessner Co. v. Rublee, 42 Minn. 23, 43 N. W. 569; Baker v. Taylor, 54 Minn. 71, 55 N. W. 823.

The intervenor in this case having shown the actual character of the bill of sale, and his right to the property therein described as against Wellington, it was necessary for the plaintiff, in order to bring her case within the rule stated, to establish, not only that her vendor was in the actual possession of the piano at the time she purchased it, but also that she was a purchaser for value, in good faith, without notice. As to the first requisite, the trial court found that the property was, at all times after the making of the bill of sale, in the actual possession and control of the intervenor; and, as to the second, the court made no finding, nor was it requested so to do. It necessarily follows that, if the finding as to the possession is sustained by the evidence, the conclusion of the court that the plaintiff was not, but that the intervenor was, the owner of the property, is correct. But, if the finding is not sustained by the evidence, the conclusion of the court is still correct, unless the evidence is such as to require, as a matter of law, a finding that she purchased the property in good faith, for value, without notice of the intervenor's rights.

Counsel for plaintiff insist that the finding of the court as to possession is not sustained by the evidence, and that it conclusively establishes the good faith of the plaintiff. The documentary evidence relied on to support plaintiff's contention is: An absolute bill of sale, containing a covenant of warranty of title of the piano, from the intervenor and owner to Wellington; the intervenor's receipt, stating that he had received of Mary M. Wellington $125 in full for the piano and stool, and that "possession is hereby given to said Mary M. Wellington;" a receipt from the defendant, Freimuth, to Mary M. Wellington, acknowledging that he had received the property from her, and agreeing to return it on demand; a bill of sale of the property, and a receipt for the purchase money, from Wellington to the plaintiff. The evidence is undisputed that Van Baalen and Freimuth, with their respective wives, who were mother and daughter, lived together as one family in the house in the city of Duluth mentioned in the bill of sale at the time the transactions

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in question took place, and that the former owned the piano, and had it in his actual possession in the house occupied by him, when the bill of sale was made; and, further, that it remained in his actual possession thereafter as before, unless the giving of the receipts changed the possession from him to Freimuth. There is no claim that the piano was ever moved until it was taken away by the officer by virtue of process issued herein. The testimony of Van Baalen shows that he learned of the making of the receipt by Freimuth some time after it was made, and that some arrangement was made with Wellington whereby Freimuth was to pay $4 a month rent for the use of the piano. His testimony on this point was substantially this:

"Mr. Wellington wanted some money paid on the piano as interest and part of the principal, and said that he was going to get the interest, or take the piano out of the house. I said I would not like to have him do that. So it was finally agreed between Mr. Wellington and me that we should meet with Mr. Freimuth at the St. Louis Hotel, and we did so meet; and it was agreed that I should pay $10 for the use of the money up to that time, and Mr. Freimuth was then to pay $4 a month for the use of it until I paid up the original loan. The piano was to remain there in Mr. Freimuth's house, and Mr. Freimuth was to pay $4 a month. Q. Why was Mr. Freimuth to pay $4 a month? A. Because the piano was to remain in the house, he was to pay $4 a month for the use of it until I paid up the loan. * * * It was understood that Mr. Wellington had rented it to Mr. Freimuth, and would take $4 a month from him, but that was only on condition that I paid him back $10 that he claimed was due for the use of the money up to that time."

The testimony of Freimuth (the defendant, who gave the bond to secure a return of the piano to him) was practically to the same effect.

We are of the opinion that the evidence justified the trial court's conclusion that the intervenor never delivered possession of the piano to Wellington, except on paper, as a part of the scheme to secure the payment of the usurious loan, and that the evidence sustains the finding as to the intervenor's possession. We are also of the opinion that the evidence on the question whether the plaintiff was a bona fide purchaser of the property without notice was not

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such as to require, as a matter of law, a finding on the question in her favor.

Order affirmed.

FRANK WANEK v. CITY OF WINONA.

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November 17, 1899.

Nos. 11,807—(162).

Personal Injury—Physical Examination of Plaintiff.

In a civil action for personal injuries, in which the plaintiff tenders an issue as to his physical condition, the trial court has the power, in a proper case, upon proper safeguards to protect the rights of both parties, to order the plaintiff to submit to a physical examination of his person in order to ascertain the nature and extent of his injuries, and, if he refuses to do so, his action should be dismissed. Facts considered, and *held*, that the court erred in denying defendant's application for an order requiring plaintiff to submit to a physical examination of his person.

Action in the district court for Winona county to recover $10,050 for personal injuries. The case was tried before Snow, J., and a jury, which rendered a verdict in favor of plaintiff for $4,000. The court made an order granting a motion for a new trial, unless plaintiff should consent to a reduction of the verdict to $3,000 and otherwise denying the motion. Plaintiff consented to the reduction, and from the order defendant appealed. Reversed.

W. A. Finkelnburg and *O. B. Gould*, for appellant.

The overwhelming weight of authority sustains the power of the court, as a matter of right, to order an examination. Hatfield v. St. Paul & D. R. Co., 33 Minn. 130; Schroeder v. Chicago, 47 Iowa, 375; White v. Milwaukee, 61 Wis. 536; Sibley v. Smith, 46 Ark. 275; Miami v. Baily, 37 Oh. St. 104; Alabama v. Hill, 90 Ala. 71; Graves v. City, 95 Mich. 266; Atchison v. Thul, 29 Kan. 466; Richmond v. Childress, 82 Ga. 719; Sioux City v. Finlayson, 16 Neb. 578; Fullerton v. Fordyce, 121 Mo. 1; Houston v. Berling, 14 Tex. Civ. App. 544; Belt v. Allen (Ky.) 44 S. W. 89; St. Louis v. Dobbins, 60 Ark. 481; 1 Thompson, Trials, § 859; 2 Jones, Ev. §§ 398, 399.

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H. M. Lamberton and *Brown & Abbott*, for respondent.

The court had power in its discretion to deny the application for an examination. Hatfield v. St. Paul & D. R. Co., 33 Minn. 130. It is true that where the court has discretion, but refuses to exercise it on the ground that such discretion does not exist, error is committed. But the reason for the rule is that if the discretion had been exercised, it might have been in favor of the complaining party. Leonard v. Green, 30 Minn. 496; Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 58. In this case the denial was on the merits. The court has, however, no power to grant such examination. Union Pacific Ry. Co. v. Botsford, 141 U. S. 250; Illinois Cent. R. Co. v. Griffin, 80 Fed. 278; Roberts v. Ogdensburgh, 29 Hun, 154; McQuigan v. Delaware, 129 N. Y. 50; Pennsylvania v. Newmeyer, 129 Ind. 401; Parker v. Enslow, 102 Ill. 272; Peoria v. Rice, 144 Ill. 227; Cole v. Fall Brook, 159 N. Y. 59.

MITCHELL, J.

This action was brought to recover damages for personal injuries caused by the alleged negligence of the city in allowing a public sidewalk to become and remain out of repair, and in an unsafe condition for public travel.

The only question which we find it necessary to consider is whether the trial court erred in denying the application of the defendant to require the plaintiff to submit himself to a physical examination by two or more competent and disinterested physicians, to be named by the court, in order to ascertain the nature and extent of his injuries. The alleged injuries were sustained October 19, 1898. The plaintiff's notice of his claim for damages was served on the city November 14, 1898. This action was commenced December 9 of the same year, and defendant's application for a physical examination was made May 1, 1899, the first day of the term at which the action was tried. The complaint alleged that the injuries would be permanent, and the existence or nonexistence of at least some of the injuries could only be ascertained by a physical examination of plaintiff's person. The trial court denied the application upon the grounds, as shown by his memorandum: First, that he had no power in any case to order a party to submit to a physical ex-

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amination of his person; and, second, even if he had the power, he would, in the exercise of his discretion, have refused, under the circumstances of the case, to grant defendant's application.

1. We are very clearly of the opinion that the court has the power, in a case of this kind, to order the plaintiff to submit to a physical examination of his person. We shall not go into any extended discussion of a question which has been so much and so often discussed by courts and text writers. Upon both principle and reason we are of opinion that in a civil action for physical injuries, where the plaintiff tenders an issue as to his physical condition, and appeals to the courts of justice for redress, it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon an application reasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so.

We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the state for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination. But he must either submit to it, or have his action dismissed.

Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such

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actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called "medical experts." To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment.

2. The next question is whether there was an abuse of discretion in denying plaintiff's request. The opinion of the learned court that he would have denied it even if he had the power to grant it may quite naturally have been somewhat influenced by the fact that he was apparently very decided in his own view that the law was and ought to be that courts have no such power. The only reason suggested in his memorandum why he would have denied the application in the exercise of his discretion is that the defendant had already had an opportunity for the examination of the person of the plaintiff. The facts, as disclosed by the affidavits interposed by the plaintiff in opposition to the application, were substantially as follows:

A day or two after the accident, the plaintiff's wife, at her husband's request, called on one of the city aldermen, and requested him to send the city physician to see and treat the plaintiff at the city's expense. The alderman having ascertained that the city physician was absent from the city, requested Dr. Keyes to do so in his place. Dr. Keyes did so, and attended and treated the plaintiff for some time, and during such treatment examined his person two or three times. The last of these examinations was on October 31, which was before this action was commenced, and before plaintiff had even served on the city notice of his claim for damages, and consequently before the city officials knew, or had the means of knowing, what injuries he would claim to have received. Plaintiff,

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having become dissatisfied with Dr. Keyes' treatment, discharged him, and employed another physician, since deceased. Subsequently—the exact date does not appear, but presumably after plaintiff had served notice of his claim against the city—the city attorney, accompanied by Dr. Keyes, came to plaintiff's house, and demanded that he submit to another examination, which he declined to do.

The above is the only opportunity the defendant has ever had of examining the plaintiff's person. The injuries alleged in the complaint are numerous, severe, and permanent, consisting of injuries to his leg, back, right side, right groin, testicles, bladder, and nervous system. Assuming that the examinations by Dr. Keyes in the course of his treatment of the plaintiff are to be considered as made at the request and in behalf of the city, still, being made before it knew what injuries he would claim in his complaint, they could not have been specifically directed to ascertaining whether those particular injuries had or had not been sustained. Again, in any view of the case, the developments during the intervening six months would be most valuable, if not essential, in ascertaining the severity of the injuries, and whether they were permanent. For these reasons, we are of opinion that the trial court erred in not granting defendant's application.

We discover no other error in the record, but for this one the order appealed from must be reversed, and a new trial granted. It is so ordered.

J. HARRIS COOL v. THOMAS H. KELLY.

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November 17, 1899.

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Nos. 11,814—(73).

Ejectment—Adverse Possession.

This is an action of ejectment, in which it is *held* that a finding of the trial court to the effect that the defendant was not, for 15 years next before the commencement of the action, in the adverse possession of 33 acres of the land in dispute, is not sustained by the evidence.

Tax Certificate Void—Delinquent Tax of 1889 and Prior Years.

A tax-sale certificate, made pursuant to Laws 1893, c. 150, which

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recites a sale of land pursuant to a tax judgment in proceedings to enforce the payment of taxes upon real estate delinquent in the year 1879 and prior years, and in the year 1889 and prior years, without otherwise indicating for what taxes the judgment was rendered, *held* void on its face.

Action of ejectment in the district court for Steele county. The case was tried before Buckham, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant appealed. Reversed.

H. E. Johnson and *Wheelock & Sperry*, for appellant.

Harlan E. Leach and *Sawyer & Sperry*, for respondent.

START, C. J.[1]

This is an action of ejectment, the subject-matter of which is a quarter section of land in the county of Steele. The complaint was in the usual form, and the defendant by his answer denied plaintiff's title, and alleged that he was the owner of the land by adverse possession, and pleaded the statute of limitations. He also asserted title and right to possession of the land under a certain tax-sale certificate. It was admitted on the trial that the plaintiff was the holder of the record title to the land. The trial court found that the defendant was not at any time prior to May 28, 1889, in possession of any part of the land in hostility to the owner of the record title; also, that the tax-sale certificate under which the defendant claimed the right to retain possession of the whole of the land was void on its face. The defendant appealed from the judgment entered on the findings.

1. The defendant's first contention is that the finding of the trial court as to adverse possession is not sustained by the evidence. The evidence is undisputed, and the court so found, that on August 1, 1861, the United States issued its patent for the land, and that it has ever since been vacant and unoccupied, except as it has been in the possession of the defendant; and, further, that defendant went upon the land in 1877 and 1878, broke about four acres thereof, and has ever since that time continued to use and cultivate the part so broken in connection with his own cultivated land adjoining the same, and that in the year 1882 he fenced in with adjoining lands of

[1] MITCHELL, J., took no part.

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his own about 29 acres of this land for a pasture, and has ever since that time maintained said fence, and continued the use of such tract as a pasture in connection with his own adjoining land. The defendant's entry upon and occupancy of the 33 acres so cultivated, fenced, and used by him was without color of title; but on May 28, 1889, the holder of certain tax-sale certificates of the whole of the land executed to him a quitclaim deed thereof, and thereafter he took, under such deed, the actual possession of the balance of the quarter section here in dispute, and ditched and fenced in the whole thereof. The evidence is also practically undisputed that when the defendant entered upon the 33 acres the balance of the quarter was a swamp, and covered with water, except a few small and disconnected pieces of high ground.

The defendant, from this fact, claims that he occupied and used the whole quarter from the date of his actual entry upon the 33 acres in the only manner the land was capable of; hence, his possession extended to the whole quarter. The evidence does not justify the claim, and the question as to the defendant's adverse possession must be limited to his occupancy of the tract of 33 acres.

It was not necessary that the defendant should have entered upon the tract under color of title, in order to make his possession adverse, and set in motion the statute of limitations. If he took and held possession with the intention of holding the tract for himself to the exclusion of all others, his possession was hostile and adverse. An adverse intent to oust the owner and possess for himself may be generally evidenced by the character of the possession and the acts of ownership of the occupant. His good or bad faith in the premises is not material. Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424. The undisputed evidence establishes that the defendant, more than 15 years next before the commencement of this action, entered upon, fenced, cultivated, and pastured the tract of 33 acres, and that at all times thereafter he was in the actual, open, exclusive, and continuous occupancy thereof. There is no substantial controversy as to this proposition, but it is claimed by the plaintiff that such possession of the defendant was not adverse or hostile; and the trial court so found. If the defendant, when he entered into possession of the tract, did so with the intention of claiming it

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as his own, then his possession was hostile, and his claim of title by adverse possession is established. The trial court was unable to find from the evidence that he did enter with such intention, and accordingly found, in effect, that his possession prior to his obtaining color of title—the quitclaim deed—was not hostile. Is this finding sustained by the evidence?

The testimony of the defendant on this point was to the effect that he entered upon the land because it would fit in with his own farm, and with the purpose of claiming it as his own, as he understood that it had been abandoned; that he went on to it with the understanding that it was to be his, and so claiming it. All of his acts characterizing his possession, as shown by the evidence, corroborate his testimony. It is true, as claimed by plaintiff, that the defendant made no oral declarations to his tenants or any one else that he claimed the land; but the absence of such declarations has no tendency to show that his possession was not adverse, unless he was interrogated as to the character of his possession, or his right to the land was in some way challenged. Village of Glencoe v. Wadsworth, 48 Minn. 402, 403, 51 N. W. 377. Such is not this case. It is also true that he did not pay any taxes on the land prior to the time he obtained his quitclaim deed. This, however, has no tendency to prove that he did not occupy the land with the intention of claiming it as his own if he could. It is not an unreasonable inference that he preferred to let the taxes go unpaid until an action to dispossess him was barred, or until he could purchase the tax title, as he afterwards did. Again, it is urged that the defendant changed his attitude towards the land after he got his deed, in that he thereafter extended two ditches across the 33-acre tract. This is not significant, for it has no tendency to change the character of his previous possession. These are substantially all the facts here urged by the plaintiff in support of the finding that the defendant's possession was not what it appeared to be from his acts; that is, hostile and adverse. They are, in our opinion, insufficient.

We accordingly hold that the evidence is practically conclusive that the defendant's possession of the tract was adverse, and that the finding of the trial court to the contrary is not supported by the evidence.

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2. The defendant, for the purpose of showing that he was entitled to retain possession of the whole quarter section in question, offered in evidence a tax-sale certificate thereof to himself dated October 12, 1893, and purporting to have been made pursuant to the provisions of Laws 1893, c. 150, approved April 10, 1893. The trial court found that this certificate was void on its face, and refused to receive it in evidence for the purpose stated. The finding and ruling are assigned as error.

Such certificate, if valid on its face, was prima facie evidence that the title to the land therein mentioned was in the person therein named, subject to the right of redemption at any time within one year from the date of the sale, and that the purchaser was entitled to the possession of the land until it was redeemed. Such are the express provisions of the statute which prescribes the form of the certificate. Laws 1893, c. 150, §§ 5–7. The land was still subject to redemption at the time of the trial of this action. Counsel for the plaintiff urge that, because the tax-sale certificate was not pleaded in the answer, the ruling of the court, in any event, was correct. It was not necessary to plead it, for neither party pleaded the source of his title, and the right of the plaintiff to the present possession of the premises was in issue by the denials of the answer, and the certificate, if valid on its face, was competent and material evidence on that issue. But the trial court was correct in holding that the tax-sale certificate was void on its face.

It is true that it is substantially in the form prescribed by the statute. It, however, states that the sale was made pursuant to a tax judgment dated September 12, 1893, in proceedings to enforce the payment of taxes upon real estate delinquent in the year 1879 and prior years, and in the year 1889 and prior years. Otherwise than this, it does not indicate for what taxes the judgment was rendered. Hence it appears on the face of the certificate that the judgment was based on taxes delinquent in the year 1879 and prior years; that is, it appears on the face of the certificate that the statute of limitations had run against any action to obtain a judgment against the land for the taxes delinquent in 1879 and prior years when Laws 1893, c. 150, was enacted. So much of this act as purports to authorize the recovery of a judgment for taxes or on

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tax judgments against which the statute had run before the approval of the act is invalid, and any judgment based thereon is a nullity. Pine Co. v. Lambert, 57 Minn. 203, 58 N. W. 990; Kipp v. Elwell, 65 Minn. 525, 68 N. W. 105. The last case cited is conclusive that such a judgment is void, and the certificate showing upon its face that the sale was made pursuant to a void judgment, is itself void.

Judgment reversed.

ANDREW JOHNSON and Another v. FRANK SACKRISON.

November 17, 1899.

Nos. 11,838—(77).

Counterclaim—Reply States a Good Defense.

The reply to the defendant's counterclaim for the stipulated rent in a lease between the parties hereto admitted the execution of a lease, and entry thereunder by the plaintiffs, and alleged that thereafter they were compelled to, and did, attorn to a third party, the then owner of the demised premises; that the defendant had no title or right to lease the premises, but they have paid to the defendant all rent accruing during the time they occupied the premises under him. *Held* that, as against an objection first made on the trial, the reply states a defense to the counterclaim.

Finding Sustained by Evidence.

Evidence *held* sufficient to support the findings of the trial court to the effect that the allegations of the reply are true.

Action in the municipal court of Minneapolis to recover $160.75 for goods sold and money lent. The case was tried before Holt, J., who found in favor of plaintiffs for $136.73; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

C. E. Brame, for appellant.

Jones & Babcock, for respondents.

START, C. J.

Action to recover for goods sold and money loaned. The defendant, as a counterclaim, alleged that on March 15, 1894, he was in the lawful possession of a store building and the land upon which it was

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situated, and that on that day he leased them, with certain butcher's tools, from month to month, to the plaintiffs, for the agreed rent of $15 per month; that the plaintiffs entered into possession of the premises under the lease, and so occupied them until December 19, 1895; and that they have not paid the rent therefor, except for five months. The reply admitted that the plaintiffs entered into possession of the premises under a lease from the defendant, but alleged that he had no title thereto or right to lease them, and that on September 19, 1894, they were compelled to, and did, attorn to the Security Savings & Loan Association, the then owner of the premises, and thereafter occupied them as its tenants until December 19, 1895; and, further, that they paid the defendant in full for the rent for all of the time that they occupied the premises under him, and that they paid the loan association the rent for the time they occupied the premises under it; and, further, that they paid the defendant for the butcher's tools, and for the use thereof, prior to such purchase.

There was no controversy as to the plaintiffs' cause of action on the trial, and the only issue tried was as to the truth of the plaintiffs' reply. The trial court found the foregoing allegations of the reply to be true, and ordered judgment for the plaintiffs for the amount of their claim, and the defendant appealed from an order denying his motion for a new trial.

There are 19 assignments of error. The more important of them raise the question that the trial court's findings of fact are not sustained by the evidence. There was evidence tending to show that the loan association was the owner of the premises in question, and leased them to the defendant, who leased them to the plaintiffs; that in and by the lease to the defendant it was expressly stipulated that the lessor might re-enter and take possession of the premises in case of default in the payment of rent; that prior to September 15, 1894, such default occurred, and the lessor took possession on that day, and leased the premises to the plaintiffs, who thereafter paid rent to the lessor, the loan association, and thereafter acknowledged it as their landlord; that this was done with the knowledge and consent of the defendant. The defendant, however, denied this evidence in many substantial particulars; but he admitted that he

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knew that the plaintiffs were paying rent to the loan association, and that he made no demand on the plaintiffs for the payment of the rent to himself. We are of the opinion that the findings are sustained by the evidence.

The defendant further claims that the court erred in receiving any evidence in support of the allegations of the reply, for the reason that they are mere conclusions of law, and do not state a defense. The objection was first made on the trial, and then obscurely. The allegations of the reply are to the effect that a third party was the owner of the premises, and that the plaintiffs were compelled to, and did, attorn to such owner. It may be conceded that, to be valid, an attornment must be made with the privity or consent of the original landlord, or the tenant must attorn to one having a superior title, under circumstances placing him in the same position as if he had gone out of possession, and had come in again under the new landlord. Neither such consent nor circumstances are alleged in the reply, but the objection was first raised on the trial; and it must be held, as against such objection, that the allegation that the plaintiffs did attorn to the holder of the superior title is the statement of an ultimate fact, implying that the attornment was made in such manner and under such circumstances as to be valid and effectual. See Collom v. Bixby, 33 Minn. 50, 21 N. W. 855. The objection was rightly overruled.

The defendant also assigns as error the admission of the lease from the loan association to him. His claim is that the lease was not identified, and that the premises therein described were not those described in his answer. The lease was shown to the defendant when he was on the witness stand, and he testified with reference to it as follows: "I held the premises in dispute under this lease. * * * That is the lease under which I held the premises in question, and it is my signature. These leases were made in duplicate, and this is one of them." His own testimony answers his contention. There was no question on the trial as to the identity of the premises.

The remaining assignments of error are less important and less doubtful than the last one considered.

Order affirmed.

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GEORGE STEWART v. ST. PAUL CITY RAILWAY COMPANY.

November 17, 1899.

Nos. 11,840—(131).

Street Railway—Personal Injury—Photograph of Locality.

In an action for personal injuries caused by the alleged negligence of the defendant in stopping its car for a passenger to alight at an unsafe place, the principal issue being the distance from the car steps to a hole in the street, the defendant, after the hole had been filled, and about eight months after the accident occurred, placed the car where it claimed it stood at the time of the accident, and a crowbar where it claimed the hole had been, and then caused a photograph of the surroundings to be taken. Upon the trial the defendant offered the photograph in evidence, accompanied by an offer to prove that the car stood about where it stood when the accident occurred, and that the crowbar correctly indicated the location of the hole. *Held*, that there was no error in refusing to admit the photograph in evidence.

Action in the district court for Ramsey county to recover $1,000 damages for loss of services and society of plaintiff's wife. The case was tried before Brill, J., and a jury, which rendered a verdict in favor of plaintiff for $250. The court refused to submit to the jury the following special questions:

"Did the car from which Mrs. Anna Stewart stepped at the time of this accident go so that the rear end of it was south of the point of the switch? If the jury answer the above question in the affirmative, then it will answer the following question: How many feet south of the point of the switch was the rear end of the car when Mrs. Stewart stepped from it?"

From an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Munn & Thygeson and *Hugh T. Halbert*, for appellant.

The court erred in excluding the photograph and the testimony which showed its accuracy. Beardslee v. Columbia, 188 Pa. St. 496; Dederichs v. Salt Lake, 14 Utah, 137; Barker v. Town, 67 Iowa, 146; Archer v. New York, 106 N. Y. 589; Church v. City, 31 Wis. 512;

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Bruce v. Beall, 99 Tenn. 303; Cooper v. St. Paul City Ry. Co., 54 Minn. 379. On the general subject see 31 Cent. L. J. 416; Alberti v. New York, 118 N. Y. 77; Dyson v. New York, 57 Conn. 9; Warner v. Village, 18 App. Div. (N. Y.) 458; People v. Buddensieck, 103 N. Y. 487; Marcy v. Barnes, 16 Gray, 161; Randall v. Chase, 133 Mass. 210; Locke v. Sioux City, 46 Iowa, 109; Udderzook v. Com., 76 Pa. St. 340; Ruloff v. People, 45 N. Y. 213.

S. P. Crosby, for respondent.

The photograph was inadmissible. State v. Holden, 42 Minn. 350; Cooper v. St. Paul City Ry. Co., 54 Minn. 383; 31 Cent. L. J. 414.

MITCHELL, J.

The plaintiff is the husband of the plaintiff in the action of Stewart v. St. Paul City Ry. Co., supra, page 85; and this action was brought to recover damages for loss of the society, services, etc., of his wife, resulting from the same injuries which were the subject of the other action. The opinion in the other case disposes of all the points raised on this appeal, except two.

In this action, as in the former, the chief contest was over the distance and direction of the hole, into which the wife stepped, from the steps of the car from which she alighted. Very soon after the accident occurred this hole was filled up, but, as the evidence tended to prove, its location was still capable of identification. About eight months after the accident the defendant took the same car out to the locus in quo, and placed it, as is claimed, in the same place where it stood at the time of the accident, placed a crowbar in a vertical position where the hole was claimed to have been, and then caused a photograph to be taken, showing the car steps and the crowbar. This photograph was offered in evidence, accompanied by offers to prove that the crowbar was placed where the witness had found the hole immediately after the accident, and that when the photograph was taken the car was standing six feet from the point of the switch referred to in the evidence, and that the photograph was a correct representation of the surroundings. The evidence previously introduced tended to show that at the time of the accident the car stood six or seven feet from the point of the

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switch. The court excluded the offer, and refused to admit the photograph in evidence

Photographs are frequently admitted in evidence as either secondary or demonstrative evidence, according to the method of their use. In this case the photograph was evidently offered as demonstrative evidence. As such they are competent whenever it is important that the locus in quo, or any object, person, or thing, be described to the jury. In such cases they serve to explain or illustrate and apply the testimony, and are aids to the court or jury in comprehending the questions in dispute, as affected by the evidence. But their value depends upon their accuracy. They must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy. The mere fact that the hole had been filled up would not of itself be sufficient ground for excluding the photograph, if otherwise competent. In this case not only had the hole been filled up, but the car had been removed, and the defendant attempted to reproduce the former condition of things. The value, if any, of the photograph, depended upon the fact that the condition existing when it was taken was an exactly accurate reproduction of the condition existing when the accident occurred. An error of a single foot in the location of the car or of the hole might render the photograph very misleading to the jury. A photograph may be a correct representation of a place, and yet, from a variety of causes, be very misleading as to distances or the relative size or location of objects.

In this case a photograph would have had no real value as demonstrative evidence. Given the exact location of the hole and of the car at the time of the accident, the distance and direction of the one from the other was a mere mathematical problem, to be solved by a measurement on the face of the earth. The photograph could in no way aid in this matter. Its only effect would be to possibly mislead the jury, and give them an erroneous impression of distance, resulting either from the manner in which it was taken, or from error in the evidence tending to show that the car and the crowbar constituted an exact reproduction of the condition existing at the time of the accident,—prone, as juries would naturally be, to accept any photograph as absolutely correct, not only as to the

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physical objects which it represents, but also as to the impressions which it conveys as to size and distance. We do not think that the court erred, under the circumstances, in excluding the photograph.

Neither was there any error in the court's refusing to submit to the jury the special questions of fact requested by the defendant. This is a matter peculiarly within the discretion of the trial court. If there can be any case where it would be error for the court to refuse to do so, this was not such a case.

Order affirmed.

PETER S. NEILSON v. PENNSYLVANIA COAL & OIL COMPANY and Others.

November 17, 1899.

Nos. 11,842—(54).

Estoppel by Verdict—Promise to Pay Debt of Third Person.

A former judgment does not operate as an estoppel by verdict, except as to facts shown to have been directly put in issue, and the finding of which was necessary to uphold the judgment. Rule applied, and *held*, that the judgments referred to in the opinion herein do not estop the respondent from showing that the defendant corporation assumed and agreed to pay the indebtedness of a third party, which has been assigned to him.

Finding Sustained by Evidence.

Evidence *held* sufficient to sustain the finding of the trial court to the effect that such defendant did assume and promise to pay such indebtedness.

Action in the district court for Hennepin county by plaintiff as receiver of the Pennsylvania Coal & Oil Company, an insolvent corporation, to enforce the liability of its stockholders. W. S. Dwinnell and other creditors intervened, and the matter of their claims was tried before Elliott, J., who found in favor of Dwinnell in the sum of $5,355. From an order denying a motion for a new trial, Frank Heywood and others, intervenors and also defendants, appealed. Affirmed.

Jones & Babcock, for appellants.

Daniel Fish and *W. S. Dwinnell*, for respondent.

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START, C. J.

Action against the Pennsylvania Coal & Oil Company, hereinafter referred to as the "Coal Company," an insolvent corporation, and its stockholders, to enforce their liability for its debts. The claim of the respondent herein, W. S. Dwinnell, against the coal company, based upon its alleged promise to pay the indebtedness hereinafter stated, was allowed in the sum of $5,355. Certain other creditors and stockholders appealed from an order denying their motion for a new trial of the issues as to such claim.

The facts, as to this particular claim, found by the trial court, briefly stated, are these: William H. Barber, on May 31, 1893, sold to the coal company his assets and coal business, and as a part of the consideration therefor it assumed and promised to pay certain of his indebtedness to the Bank of New England. Such indebtedness was then represented in part by his three promissory notes to the bank for $3,500, $900, and $500, respectively. Afterwards Barber, who became president of the coal company, assumed to indorse its name on the $3,500 note, and for the other two notes he substituted, with the consent of the bank, new notes for the same amounts, respectively, signed by the coal company, by him as its president. Thereafter, on June 30, 1893, the bank became insolvent, and a receiver was appointed for it. The receiver brought suit on the two substituted notes against the coal company, and such proceedings were had in the action, and such findings and conclusions made by the court, as to constitute an adjudication of the rights of the respondent herein upon the two substituted notes. No action was ever brought by the receiver against the coal company on its supposed indorsement of the $3,500 note, or upon its promise to pay the debt represented by it. The receiver, after bringing the action on the substituted notes, duly sold to the respondent for a valuable consideration certain of the assets of the bank, including the notes and indebtedness hereinbefore referred to, who took them with notice of the suit. The trial court sustained the claim to the extent of the $3,500 note and interest, but disallowed it as to the other two notes.

The assignments of error present for our consideration the general question: Is the finding of the trial court to the effect that

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the coal company, for a valuable consideration, assumed and agreed to pay the indebtedness of Barber to the Bank of New England, sustained by the evidence?

It is claimed on behalf of the appellants that the evidence, exclusive of the judgments hereinafter referred to, is not sufficient to support the finding. The evidence is undisputed that William H. Barber, prior to May 31, 1893, was engaged in the fuel business in the city of Minneapolis, under the name of the People's Fuel Company, and that he then owed the bank $4,900, at least, which was represented by the three notes mentioned in the court's findings; that on that day he sold his business, and all the assets thereof, including book accounts of the face value of $12,000, to the coal company, for which he received a stipulated amount of its capital stock; and that, as a further consideration for the sale, the coal company made some agreement with him as to the payment of his indebtedness to the bank, but the parties differ as to the terms of this agreement. The appellants claim that the coal company did not assume any part of Barber's indebtedness, but that it was to pay to him, or upon his indebtedness, a sum not exceeding $5,500, as it was collected from the book accounts transferred to it by him, and not otherwise. On the other hand, the respondent claims that the coal company agreed absolutely to assume, and promised to pay, Barber's indebtedness to the bank, not exceeding the amount named. The evidence in support of the respective claims of the parties was radically conflicting, and it will serve no useful purpose here to discuss it. It is sufficient to say that we have attentively considered the evidence, and the suggestions of counsel as to its weight and credibility, and have reached the conclusion that, the judgments aside, it is sufficient to support the finding.

How far the finding is affected by the judgments, if at all, is a more serious question. Appellants, on the trial, offered in evidence the judgment roll in the action of the receiver of the bank against the coal company on the two substituted notes for $900 and $500, respectively, which shows that the coal company, by its answer, denied that it ever made the notes, and alleged that Barber had no authority whatever to execute them on its behalf, and that it received no consideration whatever for the same; and further, that

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the findings of the court were to the effect that Barber made and signed the notes, as president of the coal company, for his own accommodation, and delivered them to the bank in renewal of his private debt to it, and that the coal company never executed the notes, and never received any consideration for them, and that judgment was accordingly entered for the defendant. They also offered in evidence the judgment roll in another action by the receiver against the coal company upon two notes of $150 each, purporting to have been made by the coal company, by its president, Barber, and its secretary, to the bank, from which it appears that a similar answer was interposed in that action, and that the findings and judgment therein were substantially the same as in the action upon the $900 and $500 notes. It is claimed by the appellants that the two $150 notes were renewals of notes for a like amount, made by Barber to the bank, which represented in part his indebtedness to the bank, which respondent claims the coal company assumed. It is not entirely clear from the record that such was the case, but it may be conceded for the purposes of this appeal.

The contention of the appellants is that these prior judgments in favor of the coal company on four of the five notes representing the indebtedness of Barber to the bank, which it is claimed that the coal company assumed, conclusively adjudicated that there was no contract of assumption of any part of such indebtedness.

The claim of the respondent herein against the estate of the coal company is based upon its alleged promise to pay Barber's indebtedness to the bank, which was represented by his notes to it, but the actions in which the judgments were rendered were based upon the alleged promissory notes of the coal company to the bank. The causes of action are not identical, hence the judgments are not a bar to the respondent's action, unless they operate as an estoppel by verdict. In order that a judgment in a former action should bind parties and privies by way of estoppel in a subsequent action as to a question of fact, it must appear from the judgment, or be shown by extrinsic evidence, that such question was directly involved within the issues made in the former action, and actually litigated and determined therein; or, in other words, a former judgment does not operate as an estoppel by verdict except as to facts shown to have

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been directly and distinctly put in issue, and the finding of which was necessary to uphold the judgment. Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; 1 Freeman, Judg. § 257.

We are now to inquire whether the alleged fact that the coal company assumed and agreed to pay the indebtedness of Barber to the bank was directly involved and determined in the issues in the actions in which the judgments were rendered, and whether a finding thereon was necessary to uphold them.

There was no extrinsic evidence offered as to what issues were made and litigated in such actions, and, unless it affirmatively appears upon the face of the judgment rolls that the question as to such assumption contract was directly involved in the issues made in the former actions, and actually litigated and determined therein, the contention of the appellants must fail. They claim that the finding that the coal company received no consideration for the notes, and that they were executed for it by Barber, without authority, for his own accommodation, excludes all possibility that the alleged assumption contract was made, for, if it had been, there would have been a consideration for the notes. But how could it be shown that there was or was not a consideration for notes that were never executed? The most that could have been shown would have been the fact that, if the coal company had made the notes, there would have been no consideration therefor. The finding in the respective actions that the coal company never executed the notes was all that was necessary to support the judgments, and a further finding that it never received any consideration for the promissory notes it never made became immaterial. If the receiver had proven on the trial that the coal company made the assumption contract, and the court had so found, the finding would have been immaterial, for he could not have recovered against the coal company on notes that it never made, on the ground that, if it had made them, they would have been supported by a consideration.

Conceding, however, without so deciding, that the finding as to the consideration for the supposed notes was material, and necessary to support the judgments, still it does not affirmatively appear upon the face of the judgment rolls that the question as to the al-

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leged assumption contract was directly in issue, much less that it was determined against the receiver, the assignee of respondent. It is only by argument and inference that the appellants claim to spell out the conclusion that the assumption contract was in issue, and necessarily determined against the receiver. This is not enough, for the judgments cannot operate as an estoppel by verdict unless it affirmatively appears by the record or by extrinsic evidence that the alleged fact was directly involved in the issue, and necessarily determined. That such is not this case is apparent from an inspection of the judgment rolls. The notes might have been made without any consideration for making them, even if the assumption contract had been made. The findings of the trial court are sustained.

Order affirmed.

STATE v. P. S. FINCH.

November 17, 1899.

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Nos. 11,855—(25).

City Ordinance Regulating Expressmen—Prosecution for Violation.

In a prosecution under an ordinance of the city of Minneapolis (to license and regulate hackmen, expressmen, etc.) for using and causing to be used on the streets of the city express wagons in the transportation of baggage and freight for hire, without first obtaining a license so to do, the gist of the offense is engaging in the business without a license; and it is not necessary that the complaint should allege what property the defendant carried, or for whom he carried it.

Authority Given by Charter of Minneapolis.

The power given by the city charter to license and regulate hackmen, draymen, and expressmen is not limited to those who occupy a regular stand on the public streets. Neither is the ordinance passed in pursuance of the charter limited in its operation to such.

Ordinance Invalid—License Fees.

The ordinance in question *held* invalid because the prescribed schedule of license fees is in some respects unreasonable in amount, and also because it contains discriminations as to amounts which are purely arbitrary.

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Appeal by defendant from a judgment of the municipal court of Minneapolis adjudging him guilty of violation of an ordinance "licensing and regulating hackmen, draymen, expressmen," etc., after a trial before Kerr, J. Reversed.

John H. Steele, for appellant.

The complaint is insufficient. The business, as carried on by defendant, was not properly subject to police regulation. In Matter of Jacobs, 98 N. Y. 98; State v. Robinson, 42 Minn. 107. The ordinance is not equal or uniform. Moore v. City of St. Paul, 48 Minn. 331; Moore v. City of St. Paul, 61 Minn. 427. The council had no right to pass such an ordinance. Authority must appear affirmatively in the charter. City of St. Paul v. Traeger, 25 Minn. 248; City of Mankato v. Fowler, 32 Minn. 364. No greater fees should be required than necessary to pay for issuing the license and police supervision. City of Duluth v. Krupp, 46 Minn. 435. The valid and invalid parts are so intermixed that no part can be sustained. Cicero v. Town, 176 Ill. 9. The classification is for revenue and not for regulation. City v. Nodine, 26 Hun, 512. See Farwell v. City, 71 Ill. 269; City v. Vanlaningham, 17 Ill. App. 62. An ordinance of this nature operates only on those who hold themselves out as common carriers for hire. Joyce v. City, 77 Ill. 156; City v. Cole, 78 Ill. 114.

Frank Healey and *H. D. Dickinson*, for respondent.

Defendant not having offered to pay a license fee, is not in a position to object. State v. Inhabitants, 53 N. J. L. 132. Section 1 may stand, though section 7 be invalid. In re White, 43 Minn. 250; State v. Duluth G. & W. Co., 76 Minn. 96; State v. Schoenig, 72 Minn. 528. The classification under section 11 is proper. People v. Hotchkiss, 118 Mich. 59. As to the right to pass such an ordinance, see Ogden v. Crossman, 17 Utah, 66; In re Chipchase, 56 Kan. 357; Denver v. City, 21 Colo. 350; Davis v. Mayor, 64 Ga. 128; City v. Green, 7 Mo. App. 468; State v. Mott, 60 N. J. L. 413; Bowser v. Thompson (Ky.) 45 S. W. 73; People v. Baker, 115 Mich. 199; People v. Sawyer, 106 Mich. 428; Cronin v. People, 82 N. Y. 318, 323; Cosgrove v. City, 103 Ga. 835; Pittsburgh v. Hays, 17 Ind. App. 261. Ordinances passed under express powers as to the amount

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of burden to be imposed are left entirely to the discretion of the municipal authorities, unless grossly unjust. City v. Bazzette, 159 Ill. 284; Cooley, Const. Lim. (4th Ed.) 243; City v. Fitz, 53 Mo. 582.

MITCHELL, J.

The defendant was charged with, and convicted of, using and causing to be used upon the streets of the city of Minneapolis, in carrying baggage and freight for hire, a vehicle commonly called an "express wagon" (he being then and there a person engaged in carrying baggage and freight for hire), without having first obtained a license so to do, contrary to the provisions of an ordinance of the city entitled "An ordinance licensing and regulating hackmen, draymen, expressmen and other persons engaged in carrying passengers, baggage and freight; regulating their charges and prescribing standing places therefor."

The points urged by the defendant on appeal may be divided into three classes, viz.: (1) That the complaint was insufficient; (2) that evidence was insufficient, in that it did not show that he was carrying on the business of a hackman, drayman, or expressman, within the meaning of the ordinance, or the provisions of the city charter under which it was enacted; (3) that the ordinance was void because certain of its provisions were unreasonable.

The complaint was clearly sufficient. The gist of the offense is engaging in the specified kind of business without a license, and not the particular kind of property which he carried, or the particular person for whom he carried it.

The evidence is clear that he was engaged in the business of drayman or expressman, within the meaning of the charter and ordinance. The only difference between his manner of conducting the business, and that of the ordinary drayman or expressman, who has only one vehicle, is that he carried on the business on a larger scale, having a number of vehicles used in the business. Instead of using the street as a stand for soliciting and receiving orders from the public, he had an office for the purpose on his own premises, on the corner of two public thoroughfares, upon which his vehicles waited ready to fulfil orders when directed by him; and inasmuch as this office is on the same premises as his stables and yards, his

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teams and vehicles, when not actually employed, stand most of the time in these yards or stables, instead of the streets. But it appears that he is engaged in the business of what may be termed a public drayman or expressman, holding himself out as such, and receiving orders from the public generally.

The mere fact that a drayman or expressman occupies a stand upon the street is not the sole, or even the main, reason for regulating the business. Nor is there anything in either the charter or the ordinance limiting the police power or its exercise to those who occupy a stand upon the public streets. The business of a public hackman, drayman, or expressman is affected with a public interest, and is liable to peculiar abuses, and the principal object of these police rules is to regulate the business so as to protect the public against fraud or extortion. And it is just as necessary thus to regulate the business when conducted in a manner adopted by the defendant as it is to do so in the case of those who regularly stand their vehicles on the streets, and there solicit business or receive orders from the public, except in the single matter of providing where they may stand. The fact that the defendant charged for the use of his vehicles by the hour, instead of by the job or according to the amount of goods carried, is of no importance.

But when we come to consider the system of license fees prescribed by this ordinance, we meet with a much more serious question. The scale of fees is as follows:

"(1) For all omnibuses and accommodation coaches running in connection with hotels, shall be charged for licenses, each, the sum of $10. (2) For all omnibuses and accommodation coaches running upon established lines and at stated periods from place to place within the city, shall be charged for licenses, each, the sum of $5. (3) For all hackney coaches, carriages and other vehicles drawn by two horses or other animals, and occupying any public stand, or that shall run for the conveyance of passengers, for hire or reward, within the city, shall be charged for licenses, each, the sum of $1. (4) For all cabs or other vehicles drawn by one horse or other animal and occupying any public stand, or that shall run for the conveyance of passengers for hire or reward, within the city, shall be charged for licenses, each, the sum of $1. (5) For all baggage, express and furniture wagons and vehicles drawn by two or more horses or other animals, shall be charged for licenses the sum of $5. (6) For all baggage, express and furniture wagons and vehicles

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drawn by one horse or other animal, shall be charged for licenses, each, the sum of $2.50. (7) For all drays, carts, wagons and other vehicles running within said city for hire or reward, and not otherwise expressly provided for, shall be charged for licenses, each, the sum of $15. (8) For all wagons and other vehicles drawn by four or more horses or other animals, for the conveyance of any heavy article or thing for hire, from place to place in said city, shall be charged for licenses, each, the sum of $25. Provided, that nothing herein contained shall include omnibuses and baggage wagons running to and from hotels free of charge. (9) For each driver of any licensed two-horse vehicle the sum of $10. (10) For each driver of any licensed one-horse vehicle, the sum of $5."

The ordinance also provides that no person shall drive any of the vehicles above described without having first obtained a license as such driver, and that the owners of such vehicles shall not drive, or permit any person except a licensed driver to drive, them. It will be observed that the ordinance provides for two schedules of license fees,—one on the vehicles and another on the drivers. Within reasonable limits, this is legitimate, and is probably necessary to a full and efficient exercise of police supervision over the business. We only refer to it as bearing upon the question of the reasonableness of the license fees exacted.

License fees exacted in the exercise of the police power must be equal and reasonable. By "equality" we do not mean that exactly the same sum must be charged against every one falling within the operation of the ordinance. For example, in this case it is not necessarily true that the same fee should be imposed on every vehicle, without regard to its character or the line of business for which it is used, or that exactly the same license fee should be exacted of every driver, regardless of the kind of vehicle he drives, or what he carries in it. But what we do mean is that any distinctions that are made in that regard must not be arbitrary, but must be based upon some reason based on such a difference in the situation and circumstances as suggests the practical necessity or propriety of making a distinction as to the amount of the license fee,—as, for example, a difference in the amount of police supervision required.

The second requirement is that the fee charged shall be reasonable. Usually the amount of the license fee should be limited to

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the cost of issuing the license, and the probable expense of police supervision of those engaged in the business. In the case of vehicles occupying a regular stand on the streets, the extra cost of keeping the street clean is also an item which may be taken into account. As already held, this ordinance is not limited to that class of vehicles or drivers. There are some kinds of business which are liable to become public nuisances,—as, for example, hawking and peddling, and the sale of intoxicating liquors,—and which for that reason may, in the proper exercise of police power, be restricted by the imposition of a license fee much in excess of the cost of the license and of police supervision. But the business which this ordinance assumes to regulate is not of that character, and the city has no right to impose a license fee for the mere purpose of restriction by limiting the number of persons who engage in it.

Undoubtedly the city council in this case has quite a large discretion in the exercise of its judgment as to the proper amount of the fee, and the distinction, if any, in that regard between the different classes of persons or subjects brought within the operation of the ordinance; and the courts will not interfere with their action unless it is palpably manifest that the amount charged is excessive, or that the distinctions made are purely arbitrary. But an examination of this ordinance satisfies us that in some particulars the fees charged are clearly unreasonable, and that many of the distinctions as to their amount are purely arbitrary. Take for example vehicles for the transportation of property drawn by two or more horses. The amount of the license fees on the vehicle and the driver vary from $12.50 to $35 upon such vehicle and driver. If the operation of the ordinance was limited to vehicles occupying a regular stand upon the public streets, perhaps a court might not be justified in holding these amounts unreasonable. But it makes no distinction between those who do and those who do not. It is difficult, therefore, to see how these amounts could have been adopted with any reference to the cost of issuing the licenses and the expense of police supervision. But, even if we are wrong in this, still it is clear to us that some of the distinctions as to the amount of the fees are purely arbitrary. For example, the fee charged for hacks, carriages, and cabs used for the transportation of passengers is only

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$1, while that charged for baggage and express wagons used in carrying property varies from $2.50 to $25. To take a particular instance by way of illustration, a hack drawn by two horses used in carrying passengers is charged only $1, while a two-horse dray or express wagon used in carrying goods is charged at least $5, and, under subdivision 7 of section 9, possibly sometimes $15. It stands to reason that it cannot cost any more to issue the license in the one case than the other. It is the drivers, and not the vehicles, which require police surveillance, and popular impressions are much in error if drivers of hacks do not require as much of that as drivers of drays and express wagons.

The schedule of rates provided for in this ordinance bears evidence of being designed in part as a revenue measure as well as a police regulation, and it contains a classification, as respects the amount of fees charged, which in some of its features contains purely arbitrary discriminations. If the schedule of fees is invalid, either because unreasonable in amount, or because it makes arbitrary discriminations, the whole ordinance is necessarily invalid, at least as to vehicles used in carrying baggage or freight.

Judgment reversed, and cause remanded, with directions to the court below to discharge the defendant.

GEORGE F. RICE v. MADELIA FARMERS WAREHOUSE COMPANY and Others.

HENRY COOLING v. SAME.

November 17, 1899.

Nos. 11,888, 11,889, 11,913, 11,914, 11,915—(78, 79, 86, 87, 88).

Grain in Public Warehouse—Fraud—Action under G. S. 1894, § 2600.

Where grain deposited for storage with a corporation organized under title 2, c. 34, of the statutes, engaged as warehouseman in storing grain for hire, is wrongfully disposed of by the fraud, unfaithfulness, or dishonesty of the directors, officers, or members, the owner of the grain suffers a loss peculiar to himself, which entitles him to maintain an action against such directors, officers, or members, under G. S. 1894, § 2600, subd. 3.

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Complaint Good upon Demurrer.

Held, also, that the complaint sufficiently connects the defendants with the wrongful conversion, at least in their capacity as members or stockholders of the corporation.

Action in the district court for Watonwan county to recover the value of wheat deposited for storage with defendant company. From orders overruling demurrers to the complaints, Quinn, J., defendants A. O. Ouren, Thomas C. Hovde, Abraham Jacobson, and Frank Lee appealed. Affirmed.

Lind & Somsen and *Seager & Lobben*, for appellants.

W. E. Young and *Ashley Coffman*, for respondent.

MITCHELL, J.[1]

The complaint alleges that the Madelia Farmers Warehouse Company was a corporation organized under G. S. 1894, c. 34, tit. 2, for the purpose of building or leasing and operating elevators and warehouses, and buying, selling, dealing in, handling, storing, and shipping all kinds of grain and farm produce, etc., and during all the time from its organization, in March, 1886, until it became insolvent, and its assets were placed in the hands of a receiver, in July, 1897, it had been engaged as warehouseman in storing grain for hire under the statute regulating the storage of grain; that at divers dates between October 12, 1892, and October 18, 1893, plaintiff delivered and deposited for storage with the company as warehouseman certain quantities of wheat, which it received and accepted for storage; that each and all of the defendants have from its organization been, and still are, stockholders of the corporation. The complaint further alleges that the defendants were at various times directors of the corporation, stating the lengths and dates of their respective terms of office, from which it appears that none of them except Lee were directors all the time, and that there was no period during which they were all directors. The complaint then alleges in substance that

The defendant corporation, and the said above-named directors and officers of said corporation, contrary to the law, and without the

[1] COLLINS and BUCK, JJ., absent, took no part.

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knowledge or consent of the plaintiff, at different times between October 1, 1892, and January 1, 1896, wrongfully and unlawfully sold and disposed of and removed from said elevator all of plaintiff's grain, and converted the same to the use and benefit of the corporation and of the defendants; also that each of the defendants, while stockholders, directors, and officers of the corporation, and while managing its business as such directors and officers, fraudulently and dishonestly permitted, advised, directed, and participated in these unlawful acts, and at all times had knowledge of these unlawful, fraudulent, and dishonest acts, and of the way in which said business was being carried on, or by the exercise of reasonable diligence and care could and should have known the same.

This action was brought to recover from the defendants the value of the grain, under the provisions of the third subdivision of section 2600, G. S. 1894, which, by section 2796, is made applicable to corporations organized under title 2 of chapter 34. Each of the defendants interposed a separate demurrer to the complaint on the ground that it did not, as to him, state a cause of action.

By the wrongful conversion of his grain the plaintiff suffered a loss peculiar to himself, which enabled him to maintain an action under section 2600 against those stockholders, directors, or officers who were responsible for the wrongful act by reason of fraud, unfaithfulness, or dishonesty in the discharge of their official duties. National New Haven Bank v. Northwestern Guaranty Loan Co., 61 Minn. 375, 63 N. W. 1079. The relation of the corporation and the plaintiff prior to the wrongful conversion of the grain was not that of debtor and creditor, but of bailor and bailee; and the title of the grain, whether kept in specie by itself or commingled in a common mass with the grain of other depositors, remained, under the grain warehouse act, in the plaintiff. Hall v. Pillsbury, 43 Minn. 33, 44 N. W. 673. The complaint contains immaterial and irrelevant allegations of other wrongful acts constituting merely misappropriations of corporate assets, or frauds on other depositors, but that fact does not render it demurrable. It also contains allegations which counsel construe as meaning that the defendants have refunded to the corporation all the corporate money which they had misappropriated, including the proceeds of all the grain which they had wrongfully converted. But payment to the corporation is not

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payment to the plaintiff, nor will it relieve the defendants from their personal liability to him for the conversion of his grain.

It is also urged that the complaint does not sufficiently connect the defendants with the wrongful conversion of the grain. The allegations of the complaint in that regard are rather obscure, indicating that, at the time, the pleader had a somewhat confused idea as to the capacity in which the defendants were acting when the wheat was converted, and, if it was sought to hold them liable for acts of commission or omission solely as directors, there might be some doubt as to the sufficiency of the complaint. But the statute under which the action is brought includes "members" (stockholders) as well as directors and officers; and we think that the complaint sufficiently charges the defendants with dishonesty and fraud or unfaithfulness as stockholders, construing the latter word as including neglect of duty. See National New Haven Bank v. Northwestern Guaranty Loan Co., supra.

The questions of the statute of limitations, and whether section 2600 applies to co-operative associations organized under Laws 1870, c. 29, suggested on the argument, are not raised by these demurrers. We may add, however, that it is settled by the later decisions of this court that this is not "an action upon a statute for a penalty or forfeiture," within the meaning of the statute of limitations. See National New Haven Bank v. Northwestern Guaranty Loan Co., supra.

Orders affirmed.

HECTOR A. LA MOTTE and Others v. JOSEPH A. MOHR and Others.

November 17, 1899.

Nos. 11,901—(93).

Partition by Referees—G. S. 1894, § 5776.

G. S. 1894, § 5776, does not require that in partition of real estate the property allotted to the respective parties shall be of the same average quality. It merely requires that relative qualities and quantities shall be taken in consideration, in order that the value of the allotments may be

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in proportion to the respective interests of the parties in the whole property.

Appeal by defendants Emelia Trudeau and John B. Trudeau from an order of the district court for Ramsey county, O. B. Lewis, J., confirming the report of referees partitioning land. Affirmed.

Joseph T. Avery, for appellants.

Thomas J. McDermott, for respondents.

MITCHELL, J.[1]

This was an action for the partition of several tracts of land of which the appellant Trudeau owned an undivided half, and the respondents Whitcomb and Rozier, respectively, owned an undivided one-third and an undivided one-sixth. The appeal is from an order affirming the report of the referees dividing the property and allotting the several portions thereof to the several parties.

That the referees acted honestly, and exercised their best judgment, is not questioned. It stands admitted by the record that the portion allotted to the appellant is, in both area and value, slightly in excess of one-half the area and value of the entire property. The only objection urged to the division is that the portion allotted to the appellant contains more than its due proportion of undesirable land, or, otherwise expressed, that it is not of as good average quality per acre as the portions assigned to the respondents. This, it is contended, is in violation of the provisions of G. S. 1894, § 5776, that the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties. This statute does not require that each of the portions shall be of the same average quality per acre. This would usually be impossible. All that the statute means is that quality and quantity shall both be taken into consideration in making the division, so that justice may be done to all of the parties by allotting to them portions of equal value. The fact that, according to appellant's own admission and stipulation on the trial as to the relative values of the several tracts, the portion allotted to her is of a value equal to,

[1] BUCK, J., absent took no part.

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or slightly in excess of, what she was entitled to, entirely overcomes any force which the affidavits presented in opposition to the confirmation of the referees' report might otherwise have.

Order affirmed.

LAKESIDE RAILWAY COMPANY v. DULUTH STREET RAILWAY COMPANY.

November 22, 1899.

Nos. 11,781—(128).

Contract to Operate Street Railway.

Plaintiff built an extension to defendant's street-car line, and furnished cars for the same; and defendant, by means of its own power house and power plant, operates such extension in connection with its own line. By the terms of the contract therefor, plaintiff agreed to pay the actual cost of operating such extension, and of maintaining the same and keeping it in repair. The contract is construed, and *held*, plaintiff is not required to remunerate defendant for any part of its loss caused by the depreciation of its power house, power plant, or car houses.

Same—Interest on Investment in Equipment.

The contract provides that plaintiff shall pay to defendant "a fair proportion of the interest of the investment" of defendant "in its power house and its equipment, and in car houses and equipment." *Held*, plaintiff should pay a reasonable interest or income on the investment, and not the legal rate of seven per cent. per annum, under G. S. 1894, § 2212, on the indebtedness of defendant incurred in constructing such property, nor the rate of interest which defendant then paid or is now paying on any such indebtedness.

Action in the district court for St. Louis county to recover $12,416.52 and interest and for an accounting under a contract. The case was tried before Moer, J., who found that plaintiff was entitled to recover $13,776.07; and from an order denying a motion for a new trial, and from the judgment, defendant appealed. Affirmed.

Billson, Congdon & Dickinson, for appellant.

J. L. Washburn and *W. D. Bailey*, for respondent.

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CANTY, J.[1]

In 1892 the defendant, the Duluth Street Railway Company, operated a system of street railways in the city of Duluth, and one of its lines extended on East Superior street from the business center of the city to Twenty-Second avenue East, and there terminated. On September 1, of that year, defendant entered into a written agreement with the plaintiff, the Lakeside Railway Company, by the terms of which the latter agreed to construct an extension of such line from Twenty-Second avenue East to Lakeside (then a suburban village, and now a part of the city of Duluth), and further agreed:

"(2) That it will furnish sufficient first-class car equipment for said projected railway line, based on the number of cars run per day from Fifth avenue West, in the city of Duluth, to the Eastern terminus of its line. * * * (4) that it will pay to said party of the first part [defendant] the expense of maintaining, operating, repairing, and renewing said plant and equipment as hereinafter provided, monthly, within 10 days after the statement of the same shall have been rendered and delivered."

In consideration thereof, defendant agreed to commence to operate such extension as soon as the same was completed, and further agreed:

"(3) That it will maintain and operate said line of railway at the actual cost thereof, including, among others, the following items: 1st, the cost of operating the cars from 5th avenue West, in the city of Duluth, to Park avenue, in the city of Lakeside; 2nd, the cost of maintaining, repairing, replacing, operating, and renewing the roadway, tracks, ties, poles, wires, cars, motors, and equipment owned or provided by the party of the second part; * * * 4th, a fair proportion of the interest of the investment of party of the first part in its power house and its equipment, and in car houses and equipment. It being the intention of the parties hereto that the tracks, ties, wires, and poles east of 22nd avenue East, and cars, motors, and equipment of every nature, constituting the entire plant of said second party, shall at all times be kept and maintained by said first party in like good order, condition, and repair, including renewals of cars and motors, which it maintains and requires on its own suburban lines of similar character, and that the cost thereof shall be taken and considered as part of the expense of maintaining said line east of 22nd avenue East. That it will keep an accurate and

[1] BUCK, J., absent.

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detailed account of the items of such cost of maintenance of way and equipment, and will furnish to said party of the second part a detailed statement of such cost and expense on or about the fifth of each and every month. And, in case any of such statements shall show a cost greater than said second party shall deem fair and equitable, then such cost shall be determined by arbitration in the same manner hereinafter provided for determining value on the purchase of said railway. That it will make daily reports to the Lakeside Railway Company for the receipts for passengers' fares on said line, which receipts shall be determined by the following method: All passengers in each and every car of plaintiff going east shall be counted at 22nd avenue East by the conductor, who shall thereupon make a note of the number of passengers then in the car, and the Lakeside Railway Company shall be credited with the number of paying passengers so remaining in the car. All fares collected between said 22nd avenue East and Park avenue, going both ways, shall be credited to the Lakeside Railway Company, and on each and every car going from Park avenue west, the fares of all passengers shall be collected and registered on or before reaching 22nd avenue East; it being the intention of the parties hereto to give the Lakeside Railway Company credit for all fares collected on its cars from passengers destined to any point on its lines, or collected from passengers received at any point on its line,—that is, between 22nd avenue East, in the city of Duluth, and Park avenue, in the city of Lakeside,—and that it will make monthly settlements of the receipts of each month on the tenth day of the month following."

It was further provided that the contract should continue in force until defendant should purchase such extension under the terms and conditions stipulated. This is all of the contract that we deem it necessary to recite. Plaintiff completed the extension, and defendant commenced to operate the same on December 19, 1892, and has operated the same ever since. In February, 1895, an accounting and settlement were had between the parties covering the time up to the end of the year 1894; and this action was brought in January, 1898, for an accounting for the years 1895, 1896, and 1897. On the trial the court, sitting without a jury, found for plaintiff, and ordered judgment in its favor for the sum of $13,776.07. Defendant appeals from an order denying a new trial, and also from the judgment.

1. Before the parties entered into the aforesaid contract, defendant had constructed an electric power house for the operation of street cars, and a car house for the storage and repair of cars, and

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had equipped the power house and the car house with a large amount of machinery and appliances for use in operating, repairing, and storing cars. Under said paragraph 5 of the contract, defendant sought on the trial to be allowed for a proper portion of its loss caused by the depreciation of this power, storage, and repair plant, as part of the cost of operating the cars under the contract. The trial court refused to allow defendant to charge or recoup against plaintiff any part of the loss covered by such depreciation, and appellant assigns this refusal as error.

Under the fourth subdivision of said paragraph 5 of the contract, the court did allow defendant a portion of the interest on the investment in such power house, car house, and plant, and also allowed to defendant the same portion of the insurance and taxes paid by defendant on the same. But appellant contends that under the contract it should also have been allowed the same portion of such loss resulting from the depreciation of its plant. We cannot so hold. True, by reason of the words "among others," occurring in said fifth paragraph, the defendant may be entitled to recover other items of the cost of maintaining and operating the extension besides those items thereinafter specially enumerated. But, in our opinion, a fair construction of the contract does not warrant the claim that the parties ever contemplated that defendant should be allowed any portion of the loss by depreciation of its own plant as a part of the cost of operating such extension. Defendant agreed to maintain and operate the extension at "actual cost," and it can hardly be held that this term includes such item of depreciation of defendant's own property.

But, in any event, the most that can be said in appellant's favor is that the contract is ambiguous on this point, and therefore the practical construction which the parties themselves placed on the contract for more than three years after the extension was completed should control. See McDonough v. Hennepin County C. B. & L. Assn., 62 Minn. 122, 64 N. W. 106; First National Bank v. Jagger, 41 Minn. 308, 43 N. W. 70. The court finds that the defendant, in rendering its account from time to time, made no charge or claim for such depreciation until January, 1896, when it rendered its account for the year 1895.

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2. It will be observed that said fourth subdivision provides that plaintiff shall pay defendant "a fair proportion of the interest of the investment" of defendant "in its power house and its equipment, and in car houses and equipment." In determining what plaintiff should pay under this provision of the contract, the trial court found that defendant was paying interest at the rate of six per cent. per annum on the indebtedness incurred in constructing the plant, and allowed interest on such investment at the same rate. Appellant attacks this finding on two grounds: First, that the rate of interest should be that provided by G. S. 1894, § 2212, to wit, seven per cent. per annum; and, second, that the court erred in ascertaining and determining the rate of interest which appellant was paying, and the rate which it had been paying.

(1) Section 2212 provides:

"Interest for any legal indebtedness shall be at the rate of seven dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing."

There is in this case no "legal indebtedness," and therefore the case does not come within that statute. Neither is it a case where, in interpreting the contract, the court should adopt the analogy of the statute.

(2) Neither can we hold that the language of the contract means that plaintiff shall pay a fair proportion of the interest on the indebtedness which defendant happens to owe on its power plant or its street-railway plant. The word "indebtedness" is not used in said fourth subdivision, but the word "investment" is; and, while this provision of the contract is loosely drawn and ambiguous, we can hardly construe the word "investment" as meaning "indebtedness." At the time the contract was made, defendant's indebtedness was not funded in long-time bonds, but at that time it was a floating indebtedness, which was evidenced by promissory notes indorsed by certain of the stockholders, and drawing interest at the rate of seven per cent. per annum. These notes were afterwards funded into 30-year bonds. But the indebtedness might have been paid, or the bonds might have been foreclosed, and the plant of defendant might have been acquired by the purchaser at

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the foreclosure sale. In either case there would be no indebtedness on which the plaintiff could pay "a fair proportion of the interest," but should then pay on the "investment." Again, suppose the indebtedness had been partly paid; would plaintiff be liable to pay only "a fair proportion of the interest" on the balance? In our opinion, the plaintiff should still pay such interest on the whole investment. Neither can we hold that, because defendant was paying seven per cent. on its indebtedness when the contract was made, therefore plaintiff must pay seven per cent. during the whole time the contract is to run. Neither can we hold that plaintiff should pay the same rate of interest which defendant is paying. Defendant may not be owing any indebtedness or paying any interest at all. Again, defendant might become of doubtful responsibility, and unable to give anything but doubtful security, and might for that reason be obliged to contract to pay ten per cent. per annum on its indebtedness, when money could be borrowed on good security for three per cent, per annum. Under such circumstances, would plaintiff be liable to pay ten per cent. to defendant? Conceding that plaintiff could make a contract which would bind it to pay any amount of interest which plaintiff saw fit to pay, or was by its impecunious condition obliged to pay, still the intention to be so bound should be plainly expressed. We cannot hold that it is so expressed in this case.

In our opinion the proper interpretation of this contract is that plaintiff shall pay a reasonable rate of interest or income on the proper portion of defendant's investment. Then the points made by appellant are not well taken, and the order and the judgment appealed from should be affirmed. So ordered.

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BANK OF WILLMAR v. JERRY LAWLER.

November 22, 1899.

Nos. 11,802—(94).

New Trial Granted without Motion—Misconduct of Jury—Action in Claim and Delivery.

Held, the trial court may, under proper circumstances, grant a new trial on its own motion, at least in an aggravated case of misconduct by the jury. *Held*, further, this is such a case, as the jury wholly failed to find on the issues between the plaintiff and the defendant, and the verdict in favor of the intervenor is so manifestly and palpably against the great weight of the evidence that it would be an abuse of discretion to refuse to grant a new trial on motion made on the proper ground.

Action in the district court for Kandiyohi county to recover possession of personal property or the sum of $2,000, the value thereof, and $200 damages for its detention. Thomas Lawler intervened, and in his complaint alleged ownership of an undivided one-half of the property. The case was tried before Qvale, J., and a jury, which rendered a verdict in favor of the intervenor; and from an order whereby the court of its own motion granted a new trial, the intervenor appealed. Affirmed.

John T. Byrnes, for appellant.

Samuel Porter, for respondent.

CANTY, J.[1]

The defendant executed a chattel mortgage to plaintiff. There being a default in the conditions of the mortgage, plaintiff brought an action of replevin to recover possession of the mortgaged property, consisting of horses, cattle, sheep, wagons, and farm machinery. The answer of defendant is a general denial. At the commencement of the term of court at which the case was set for trial, Thomas Lawler, the son of defendant, intervened in the action, and in his complaint in intervention alleges that he is, and at the commencement of the action was, the owner of an undivided one-half interest in the property described in plaintiff's complaint, and de-

[1] BUCK, J., absent.

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nies that plaintiff is the owner or entitled to the possession of any part of such property. On the trial the jury found for the intervenor, "that he is the owner of one-half of the property described in the sheriff's return, and entitled to the possession thereof," but did not find on the issues between the plaintiff and the defendant at all. After setting out this verdict, the settled case proceeds as follows:

"Verdict of said jury received, recorded, read, and filed. The court then, upon its own motion, and during the absence of counsel for the defendant and intervenor, made the following order: 'Ordered, that the verdict of the jury be set aside and a new trial granted in said action, for the reason that no such verdict could be found or submitted under the instructions given to the jury. The instructions of the court, which is the law of the case, have been entirely disregarded. The verdict is contrary to law as well as contrary to the weight of evidence.' And the clerk was directed to enter the order on the minutes."

From this order of the court granting a new trial, the intervenor appeals.

Appellant contends that as our statute provides that the notice of motion for a new trial shall be in writing, and shall state the grounds of the motion, the court below had no authority to grant a new trial on its own motion. Under the common-law practice, it was well settled that the trial court could grant a new trial on its own motion. 2 Thompson, Trials, § 2711. Our code of civil procedure does not expressly cut off this power of the court, and, in our opinion, does not do so by implication, although the code may to some extent limit or modify that power. The power to grant a new trial is not given to the district court by statute. "The power of such court to grant a new trial is not, like the right to appeal under our law, conferred by statute; it is inherent in courts of general jurisdiction, not given, but regulated by statute." McNamara v. Minn. Central Ry. Co., 12 Minn. 269 (388). The provisions of such a statute regulating motions for a new trial do not prevent the court, in a proper case, from granting a new trial on its own motion. Allen v. Wheeler, 54 Iowa, 628, 7 N. W. 111; 2 Thompson, Trials, § 2711.

As a general rule, the trial court should not exercise this power except in aggravated cases. We are of the opinion that this is such

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a case. Not only did the jury fail to find on the issues between the plaintiff and defendant, as the court instructed them to do, but the verdict in favor of the intervenor is, to say the least, so manifestly and palpably against the great weight of the evidence that it would have been an abuse of discretion to deny a new trial if plaintiff had moved for one on the proper ground. The intervenor took the witness stand in his own behalf, and testified that he has had a half interest in the property since 188 He further testified:

"Q. What time was it mortgaged? A. In 1890; December 23, or about that time. It has been mortgaged substantially ever since about, nearly— I have had a half interest in all of the property. * * * Q. What consideration did you pay your father in 1889, when you bought a half interest in this property? A. Do you want me to go into details? Q. I want to know what you paid him. A. I had been staying at home all of my life. Q. You were not of age then? A. No; I was about to go away—my brother and I—both of us. He is now in Montana. He said if I would stay and help him on, as he had a good deal of work to do, and no one to help him, if I would stay he would give me possession of half,—a half interest in the stock that was there at the time. Q. That is the only consideration you paid for it? A. That is all. Q. You were then about 18 years of age. A. Yes, sir. Q. What time of the year was this? A. In the early part of January. Q. About 1889? A. Yes, sir. * * * Q. Did you keep any account between you and your father in regard to the expenses of caring for this stock? A. No, sir. Q. Who sold the stock, when any of it was sold? A. Either of us. Q. Who got the money for it? A. He got the money sometimes, and sometimes I did. Q. Did you ever get any money for it? A. Yes, sir. Q. When? A. I sold a cow to Frank Halberg, of this town, in, I think, 1892. Q. What if you did? A. I got the money for it. Q. What did you do with the money? A. I used it. Q. Used it yourself? A. Yes, sir. Q. That is all you ever got in money for any stock you sold? A. Yes; that is all I ever bought. When I sold any stock I always turned the money over to him. Q. There has been a considerable of this stock and the increase sold since that time? A. Yes, sir. Q. That is all you got in money for the sale of any of it? A. That is all. Q. That one cow? A. Yes, sir. Q. You think it was about 1891 or 1890 when you first learned that your father had mortgaged this property to the Bank of Willmar? A. Later than that. Q. How much later? A. I think the first time I learned it was this time this wheat was in question, in 1893. Q. In 1893? A. Yes, sir. Q. That is the first you knew anything about it? A. Yes, sir. Q. You had an interest in that wheat, too? A. I did. Q. A half interest? A. Yes, sir. Q. You didn't inform the bank then that you had a half interest in it? A. No. * * *

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Q. How long were you to work for your father for a half interest in this property? A. Until I got ready to get married; until I got married and settled on my own farm, or any time I might want to dissolve. Q. In whose name had this property been assessed since that time? A. It had been assessed in my father's name."

It appears by the evidence that the present mortgage is a renewal of several successive prior ones given by defendant to plaintiff,—the first mortgage being so given in 1890,—and there is evidence tending to prove that the intervenor knew during all of this time of the giving of these successive mortgages He admits that he knew all about it in 1893.

Order affirmed.

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JAMES PALMER v. WINONA RAILWAY & LIGHT COMPANY.

November 22, 1899.

Nos. 11,806—(109).

Street Railway—Failure to Employ a Conductor—Negligence.

Plaintiff was injured in getting off a street car on which one man performed the services of both motorman and conductor. In the absence of a law or ordinance regulating the matter, *held*, whether or not in the particular instance an injury might have been averted if two men had been employed to perform such services is not the test of whether the street-railway company is guilty of negligence in failing to employ the second man, but the expense of employing the second man, the amount of traffic on the streets and on the cars, and the dangers to be encountered in operating the car over the particular route, should all be taken into consideration. *Held*, the burden was on the plaintiff to show that defendant was negligent in failing to employ a conductor or second man on the car.

Damages—Pleading and Evidence.

Under a general allegation of damages in the complaint, plaintiff was entitled to prove the wages he received before the injury, the wages he received after the injury, and that he received no more before, and no less after, than he was able to earn.

Action in the district court for Winona county to recover $2,000 damages for personal injuries. The case was tried before Snow, J.,

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and a jury, which rendered a verdict in favor of plaintiff for $1,000; and from an order denying a motion for a new trial, defendant appealed. Reversed.

Webber & Lees, for appellant.

H. M. Lamberton and *Brown & Abbott*, for respondent.

CANTY, J.[1]

Defendant operates a street railway in Winona. Plaintiff, while a passenger on one of defendant's cars, was injured, and brought this action to recover damages therefor. He had a verdict, and from an order denying a new trial defendant appeals.

Plaintiff boarded the car one evening after dark, in the winter time, and started to ride out to his place of residence. He resided in the middle of the block between Sioux street and Ewing street, both of which streets are crossed by Fifth street, on which he resided, and on which the street cars run. The car on which he rode had a door at each end, and the passengers were in the habit of going in and out of both doors when getting on and off the car. The door at the front end was close to where the motorman stood when operating the car, and there was no conductor on the car, or any other person in charge of it, except the motorman. When the car arrived at Sioux street, plaintiff did not get off, but rode to the middle of the block, opposite to his residence, and then proceeded to get off through the door at the front end. He testified that the motorman stopped the car at this point in order to let him off, and that as he stood on the step, and was about to step off, the motorman suddenly started the car and threw him off on to the ground, by reason of which he was injured. The motorman testified that plaintiff approached the door while the car was in motion; that he (witness) stopped plaintiff at the door, and told him to wait until witness stopped the car; that he then turned to set the brake; and that plaintiff then stepped off before the car stopped, and while it was going quite fast. Both witnesses agree that the motorman told plaintiff to wait until the car was stopped, as the steps were icy and slippery. But plaintiff testified that he waited until the car was stopped; the motorman testified that plaintiff did not.

[1] BUCK, J., absent.

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1. The court charged the jury as follows:

"I charge you that the evidence in this case is not sufficient to warrant you in finding that the want of a conductor was the proximate cause of the injury to the plaintiff; and you are therefore instructed to leave that alleged fact entirely out of consideration, except so far, if at all, as you may think the want of a conductor increased the degree of care and watchfulness required from the motorman, and, of course, from the company, through the motorman."

Defendant requested the court to charge as follows, and the court gave the request, with the modification inclosed in brackets, following the same:

"The fact that defendant company was operating its cars without a conductor on the occasion in question is in itself no evidence of negligence. It had a right to so operate its cars. And you will therefore disregard that fact in your deliberations [except so far, if at all, as the absence of the conductor rendered necessary an increase of care and attention on the part of the motorman]."

Appellant excepted to the modification of the request, and also to the corresponding part of that portion of the charge first above quoted.

Even if it were conceded that, had there been a conductor on the car, he could, and, in the exercise of due care in the performance of his duty, should, have intervened between the motorman and plaintiff, and prevented this accident, still there is no evidence in the case which warranted the jury in finding that the defendant was negligent in failing to have a conductor on the car. In the absence of any valid law or ordinance regulating the matter, the mere fact that in a particular instance an injury might have been averted if the street-railway company had employed two men to operate and manage its car, instead of one, is not the test of whether or not the company is negligent in failing to employ the second man. A number of other circumstances must be taken into consideration. Taking into consideration the expense of employing the second man on the car, are the amount of traffic on the streets, the amount of traffic on the cars, and the danger to be encountered in operating the cars over the particular route so great that the company is negligent in failing to employ the second man? A street-railway company may be guilty of negligence in failing to

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employ the second man in a large city, where the streets are crowded with pedestrians and vehicles, or the cars are crowded with passengers, or both, while it would not be guilty of negligence in failing to employ the second man in a small city, where there is less travel on the streets or in the cars, or both. Again, the rate of speed at which the street cars run, the absence or presence of grade railroad crossings which are dangerous, and other circumstances, should often be considered. See Booth, St. Ry. Law, §§ 308, 335.

Of course, the negligence of the company in failing to employ the second man must also be the proximate cause of the injury. There is no evidence in this case to show whether or not the conditions were such that the defendant was negligent in failing to employ a conductor or second man on its cars, or on this particular car. The burden was on the plaintiff to prove such negligence. Then, if defendant was not negligent in failing to employ a conductor, it is not liable at all, if the motorman used proper care. True, proper care is care commensurate with the occasion, but the test is not the amount of watchfulness and care which two men might in this particular instance have used, when it was not the duty of the defendant to employ two men; and the parts of the charge in question were misleading, in that they left the jury to infer that it was the duty of the one man to exercise as much watchfulness and care as the two men would, under the same circumstances, have exercised. Then we are of the opinion that defendant was entitled to have the request given without the modification; that the part of the charge included in the modification is erroneous, as is also the corresponding part of said other portion of the charge, and for this error the order denying a new trial should be reversed.

2. Plaintiff was allowed to testify that before the injury he was receiving $60 per month from his employer, but received only $40 per month from him since the injury. If plaintiff had proved that before the injury he received no more than he could then earn, and since the injury he received no less that he could then earn, the evidence would have been competent, under the general allegations of damages in the complaint. See Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; 1 Sutherland, Dam. (2d Ed.) § 421. But whether the evidence of what he received before and what he received after the

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injury was, without more, incompetent under the pleadings, and whether, if it was error to receive it, the error was cured by subsequently withdrawing it, we need not consider, as it is not likely to occur on the next trial. We find no other error in the record.

Order reversed, and a new trial granted.

MITCHELL, J. (dissenting).

While it may be true that there was no necessity for the court to make the so-called modification of defendant's request to charge, yet it seems to me that, in view of the nature of the issue and the state of the evidence, it contained no prejudicial error. What the court evidently meant, and all that the jury, under the circumstances, could have understood him as meaning, was that, when there is no conductor, certain duties would devolve upon the motorman which otherwise would belong to the conductor. The only breach of duty charged in this case was starting the car before plaintiff had alighted. It was a self-evident and admitted fact that the duty of seeing that the plaintiff had safely alighted before starting the car devolved exclusively upon the motorman. The plaintiff attempted to alight from the front of the car in close proximity to the motorman, and right under his eyes; and the only issue of fact in this case was whether, as the motorman testified, plaintiff attempted to get off before the car stopped, or whether, as the plaintiff testified, the car had stopped, but was started up again before he had alighted. Under these circumstances, I am unable to see how the verdict could have been affected, or the defendant prejudiced, by the modification of the request.

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FREDERICKE SCHWEIGEL v. L. A. SHAKMAN COMPANY.

November 22, 1899.

Nos. 11,862—(167).

Delivery of Deed—Presumption.

The mother conveyed her land to her son. He then made a deed of a half interest in the land to his father, which was never recorded, and another deed of the whole land back to his mother, which was recorded

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several months afterwards. The latter deed is dated 10 days later than the deed to the father. In an action by the mother against an attaching creditor of the father, *held*, it is presumed that each of these two deeds was delivered on the day of its date, and the oral evidence to prove the contrary is so inherently inconsistent and unreasonable that the trial court was warranted in holding that it did not overcome such presumption.

Record in Foreign State—Certified Copy.

Held, a certified copy of a deed, recorded in the office of register of deeds of a county in another state, is competent to prove the date on which the deed was there recorded.

Attachment—Unrecorded Deed—Proof of Debt.

Held, as the attaching creditor is not attempting to set aside any conveyance, but is simply claiming under the unrecorded conveyance to the father, it was not necessary for such creditor to prove herein the indebtedness for which the attachment suit was brought.

Undertaking in lieu of Attachment Bond.

Held, under G. S. 1894, § 7989, an undertaking may be given in lieu of an attachment bond.

Undertaking Defective—Jurisdiction.

The undertaking is defective in failing to incorporate all of the conditions which the statute provides shall be in an attachment bond, as it omits the condition, "if the writ shall be set aside or vacated." The action was commenced by publication of summons. *Held*, the defect in the undertaking is not jurisdictional, and does not render the judgment void.

Defective Return of Sheriff.

Held, the failure of the sheriff, in making his return to the writ of attachment, to state whether or not he had served the writ on the defendant, is not a jurisdictional defect.

Action in the district court for Big Stone county to determine adverse claims to land. The case was tried before C. L. Brown, J., who found that plaintiff was owner of the land subject to the rights of defendant under an execution sale in an undivided one-half of the land. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Henry J. Gjertsen and *Curtiss Schweigel*, for appellant.

McLaughlin & Boyesen, for respondent.

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CANTY, J.[1]

On January 13, 1897, plaintiff was the owner of 160 acres of land in Big Stone county. On that day she conveyed it, and several other tracts of land in Minnesota, and in Grant county, South Dakota, to her son, and the deed was duly recorded. Thereupon the son made to his father a deed of the undivided one-half of the 160 acres and of the whole of certain parcels of the Dakota land. This deed is dated January 13,[2] 1897, and was recorded in North Dakota on September 27, 1897, but has never been recorded in Minnesota. The son made another deed, by the terms of which he conveyed back to his mother all the land which she had so conveyed to him. This deed is dated May 24, 1897, and was recorded in Big Stone county, November 8, 1897. This defendant commenced an action against the father, Christian Schweigel, for the recovery of money. A writ of attachment was issued in that action, and on July 5, 1898, his interest in the Big Stone land was levied upon and attached under the writ. Thereafter judgment was obtained in that action, and the land was sold on execution.

This plaintiff brought this action to determine the adverse claims of defendant to this land. Defendant in its answer alleges that, at the time of such attachment, Christian was the owner of the land. The attachment proceedings, judgment, and execution sale are set up, and, by reason thereof, defendant claims a lien on the land. The court found for defendant, and plaintiff appeals from an order denying a new trial.

The plaintiff claims that she deeded the land to her son when she was sick, for the purpose of saving the expense of probating her will in several jurisdictions in case of her death, and that she directed him to make a deed of an undivided one-half of the Big Stone land to his father, and to deliver it to the latter in case of her death, but not to deliver it before. There was considerable testimony given on the trial by plaintiff and her son as to verbal directions which she gave him, when she conveyed the land to him, as to how he should dispose of it. But we have a statute of frauds in this state, and such verbal directions amount to nothing as against the

[1] COLLINS and BUCK, JJ., absent.

[2] See opinion upon reargument, page 150, infra.

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defendant. The pivotal question in this case is whether the deed from the son to his father was delivered to the latter before the deed from the son back to his mother was delivered to her. If the deed to the father was first delivered, then he has the title to an undivided one-half of the Big Stone land, although his deed was never recorded in Big Stone county and the deed to the mother was. She is not an innocent purchaser for value.

The son and the father both testified that the deed to the latter was not delivered to him until the fall of 1897, and the son testified that the deed to his mother was delivered to her about July 1, 1897. But there are so many improbabilities and earmarks of untruth in the testimony of plaintiff's witnesses that, in our opinion, the trial court was warranted in refusing to believe the testimony as to the dates of the delivery of these deeds. The deed to the father is dated 10 days before the deed to the mother. The law presumes that a deed is delivered on the day it bears date. 1 Devlin, Deeds, §§ 181, 265. Then, in the absence of proof to the contrary, it would be presumed that the deed to the father was delivered 10 days before the deed to the mother.

Plaintiff testified that she deeded all of this land to her son in order that the latter should sell it. She testified: "I gave it to him at that time simply to sell it for me; that is, at the time I deeded it to him." She further testified that she instructed the son to make the deed to her husband, but that "it was never to be delivered; it was not to be delivered"; and that she afterwards instructed the son to convey all the land back to her. She further testified: "Q. When was the deed to Christian Schweigel delivered? A. I can't remember the time exactly; but Schweigel said that he had a chance to sell the land."

The son, Curtiss Schweigel, is an attorney at law, and was the main witness for the plaintiff. He testified that when his mother conveyed the land to him she directed him to distribute it according to the provisions of a will which she had already made. He further testified:

"A day or so after the conveyance was made she asked me to make a deed of the Dakota land, which had always been in my name, and of an undivided half of this land which is in controversy,

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to Christian Schweigel, and told me to deliver him that deed in case of her death. She also reserved the right to dispose of it otherwise in case she saw fit. She made this conveyance to him, as I understood it from her at the time, that he was to sell the land when opportunity presented itself, and to dispose of the proceeds according to this last will and testament. He was not to have any of the proceeds of the lands that were not conveyed to him, but he was only to have the proceeds of sales resulting from the sale of land that was conveyed in this particular deed, which was the Dakota land, and the undivided half of this land."

He further testified that, in the fall of 1897, his father wrote that he had a buyer for the Dakota land. Witness answered the letter. He further testified:

"In the spring, mother had directed me to make a deed to him of this Dakota land, and also of the undivided half that is involved here; and I told him that he would have to sell the land under that deed, and so I told him I would send him the deed; and I did send him the deed, and told him that he should sell it in that way; and told him, however, that the deed had no effect as a conveyance to himself." He further testified: "Q. Well, why did you make this deed of half interest to him? A. She [his mother] figured that he owned half interest in that land. * * * Q. But you deeded him the whole of the Dakota land? A. I did, because she thought that the Dakota land and the half interest in this property were about half in value of all the property that she possessed."

Although plaintiff testified that she instructed her son not to deliver the deed to his father, and subsequently instructed the son to convey all the land back to her, it is to be inferred from her testimony that she knew what was being done when he delivered the deed to the father. It does not appear that she ever expressed any surprise at this act of the son, or ever asked him why he disobeyed her orders. She knew, also, that her husband wanted the deed in order to sell the Dakota land. It may be inferred from the evidence that she consented to the delivery of the deed to the father. But, whether she so consented or not, the son was, for the purposes of this case, the owner of the land, and he could have conveyed it to his father, whether his mother prohibited the conveyance or consented to it.

The son's testimony is still more unreasonable, and contains a greater number of inherent contradictions. He was not to deliver

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the deed to his father until after his mother's death, and in the meantime she reserved the right to dispose of the land; and yet the deed was to be delivered to the father so he could sell the land, and was delivered to him accordingly in the lifetime of the mother, with her knowledge and apparent consent, and he did sell the land. Again, the father was not to have the proceeds of the land after he sold it, although the mother directed the deed of the land to be made to the father, because "she figured that he owed a half interest in that land," and the land described in the deed amounted to about that half interest. Again, according to the testimony of Curtiss Schweigel, he must have been acting in bad faith with his father, and his father's proposed purchaser, by delivering to the father a deed to property which the witness had several months before conveyed back to his mother. It does not appear that he had ever inquired whether his mother had already put her deed on record. If she had, it would bring confusion to the father when he undertook to make a conveyance to his proposed purchaser; and, if she had not, it would annoy and embarrass the father or the proposed purchaser when she did put it on record.

The witness further testified, in substance, that the deed delivered to the father was to amount to nothing as regards the Big Stone land, and was delivered solely to enable the father to dispose of the Dakota land; that witness did not make a separate deed of the Dakota land, because he could not at that time get his wife to join in it. But he admitted, on cross-examination, that he knew at that time that, under the laws of South Dakota, he could convey that land and give a good title without his wife's signature. There are other circumstances, too numerous to mention, which would make the case somewhat more favorable to plaintiff, if the trial court saw fit to give weight to them, and also other circumstances which tend to make the case stronger for defendant. If the deed to the father was first delivered, and was given to him to enable him to sell and convey a part of the land, he was the owner of all the land conveyed by the deed, in spite of any oral instructions or any understanding of the parties to the contrary.

2. Appellant assigns as error the admission in evidence of a certified copy of the record of the deed to the father in the office of

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register of deeds in Grant county, South Dakota. The original deed was not introduced in evidence, and whether this certified copy is competent to prove the conveyance of the land in Minnesota we need not consider. It was conclusively proved, by oral evidence received without objection, that the deed was made; that, by its terms, it conveyed the land here in question; and that it was recorded in said office of register of deeds. We are of the opinion that the certified copy was competent to prove the date of the recording of the deed in South Dakota, and that this was material, as proof that the deed was delivered at least as early as the day on which it was recorded.

3. There is evidence showing that Christian Schweigel was indebted to defendant, and the character of the debt is stated, but, as the whole record in the attachment suit brought against him by this defendant is not before the court, we cannot tell whether it is the same indebtedness for which that action was brought. But it was not necessary to prove any such indebtedness, as the attachment creditor in this case is not attempting to impeach or set aside any conveyance, but is simply attempting to stand in the shoes of Christian Schweigel, and claims a title held by him under an unrecorded conveyance.

4. An undertaking, and not a bond, was given in the attachment proceedings. Under G. S. 1894, § 7989, an undertaking is sufficient in such a case. Blake v. Sherman, 12 Minn. 305 (420), arose before the enacting of that section.

5. The undertaking is defective in failing to comply fully with the statute. G. S. 1894, § 5290, provides that an attachment bond shall be conditioned

"That if the defendant recovers judgment, or if the writ shall be set aside or vacated, the plaintiff will pay all costs that may be awarded to the defendant, and all damages that he may sustain by reason of the attachment, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars."

The undertaking, after the recitals therein, reads as follows:

"Now, therefore, we * * * undertake, promise, and agree, to and with the said defendant, that the said plaintiff shall and will pay all costs that may be awarded said defendant, and all damages

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he may sustain by reason of the said attachment, not exceeding the sum of two hundred and fifty dollars, in case the said defendant, Christian Schweigel, recover judgment in said action."

It will be observed that this undertaking is defective in failing to add thereto the words, "or the writ shall be set aside or vacated." That action was commenced by serving the summons by publication and without personal service. Therefore, if the attachment proceedings are void, the judgment is void. Appellant contends that such defect in the undertaking is jurisdictional, and the attachment and judgment based thereon are also void. We cannot hold that the defect in the undertaking is jurisdictional or is anything more than an irregularity. It is generally held that a defect in an attachment bond, or even the total want of such a bond, is not jurisdictional, but the defect may be cured by amendment or by furnishing a new bond. Blake v. Sherman, supra; 1 Enc. Pl. & Pr. 683; 1 Shinn, Attachm. § 179. It is true that where the action is in rem, the defendant not being personally served with summons, a defect may be jurisdictional which would not be jurisdictional in a suit in personam. But we cannot hold that, even in an action in rem, the defect here in question is jurisdictional. See Pennoyer v. Neff, 95 U. S. 714.

6. The return of the sheriff to the writ of attachment states that the sheriff levied the writ on the property here in question, but does not state that he served a copy of the writ, and of his return of the attachment of the real estate, on the defendant in that action. Neither does the return state that the defendant could not be found in the county. Conceding, without deciding, that the return is defective for failing to state one or the other of three things, it is a mere irregularity, which does not go to the jurisdiction. Indeed, the judgment in that action is founded on the fact that the defendant therein was not a resident of the state, and could not be found therein, and we must presume that the record in that action shows that fact.

This disposes of all the questions raised having any merit, and the order appealed from is affirmed.

On February 2, 1900, the court rendered the following opinion:

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PER CURIAM.

Upon the ground that the decision in the above-entitled action, filed November 22, 1899, was made upon an erroneously assumed state of facts, and that therefore a wrong had been done to plaintiff, a petition for a rehearing was presented by her counsel and granted.

The errors complained of in the statement of facts were as to the date of the deed by which plaintiff conveyed the land in dispute to her son, and as to the tracts of land so conveyed. It was stated in the opinion that the deed bore date January 13, 1897, and also that there was conveyed thereby to plaintiff's son certain land in South Dakota. The fact was that the deed was of date May 13, instead of January 13, and, instead of conveying land in South Dakota, it conveyed lands in North Dakota, as well as several tracts in Minnesota, in addition to the 160 acres in controversy. The mistake in the date of this deed was merely clerical, and of no consequence Nor was the conclusion of the court in any way affected by the mistake as to the location of the Dakota land. The error led to criticism of the testimony of the son, and the assertion that he had acted in bad faith when he delivered to his father a deed to property which he had previously conveyed to the mother. But these animadversions upon this supposed conduct of the son, whether well founded and perfectly justifiable or not, did not particularly bear upon, or affect our determination of, the pivotal question in the case, as the same was tersely stated in the former opinion. If what was said in reference to the behavior of the son is eliminated and expunged from the opinion,—as it must be, because based upon a misapprehension as to the facts,—we see no good reason for arriving at a different conclusion.

For that reason, the former decision is adhered to.

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JOHN MLNAZEK v. ALBERT LIBERA and Another.

78 151
s88 290
88 292

November 27, 1899.

Nos. 11,767—(120).

Reformation of Contract—Fraud of Former Partner—Partnership Account.

L. and M. were partners in contract work, and the defendant company issued to the firm its policy, whereby it agreed to pay to the assured any sums which they might become legally liable for on account of personal injuries to any of their employees. After a liability under the policy had accrued, the company and L., by false and fraudulent representations, induced M. to sign a contract to which L. had signed the firm and his own name, whereby the policy was surrendered to the company, and it was released from all liability on account thereof. This action was brought by M. against L. and the company to reform the contract so that it would express the contract as it was represented to him to be, or to cancel it. It appeared on the trial that the co-partnership had been dissolved, but there was no finding nor proof as to the state of the partnership accounts, or as to whether the plaintiff had in fact any actual interest in the firm asset so released other than as might be inferred, if at all, from the fact that he was a member of the firm. *Held*, that he was not entitled to have the release reformed or cancelled.

Action in the district court for Winona county against Albert Libera and the Standard Life & Accident Insurance Company of Detroit, Michigan, for reformation of a release, or in case such relief should be denied for its cancellation. The court, Snow, J., submitted certain questions to a jury, whose findings were incorporated by the court in its findings. As conclusions of law the court found that plaintiff was not entitled to any part of the relief demanded, and that defendants were entitled to a dismissal of the action. From a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Brown & Abbott, for appellant.

Webber & Lees and *McLaughlin & Boyesen*, for respondents.

START, C. J.

The plaintiff seeks by this action to have a certain release, which he alleges he was induced to execute by the fraud of the defendants,

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reformed so as to express the actual contract between the parties, or, in case that is denied, that it be cancelled, and adjudged of no force and effect. The cause was tried by the court, and upon its findings of fact judgment on the merits was entered for the defendants, from which the plaintiff appealed.

There is no case or bill of exceptions, and the general question for our decision is whether the facts found by the court sustain its judgment. The short facts, as found by the court, are these:

The plaintiff and Libera, on June 11, 1894, were co-partners engaged in contract work under the firm name of Libera & Mlnazek. The partnership was dissolved some time after September 26, 1896, and before the commencement of this action, but it does not appear from the evidence that the firm accounts and affairs have been settled. On the first-named date the defendant the Standard Life & Accident Insurance Company, hereinafter referred to as the "Company," executed to the firm an indemnity policy, whereby it agreed to pay the assured all sums which, during 12 months from the date of the policy, they might become legally liable for on account of personal injuries to their employees. During the life of the policy two of the employees of the firm were killed by an accident while in the line of their duty as such employees, whereby the firm became liable for damages to an amount exceeding $6,000, for which judgments were afterwards recovered against them. The company took charge of the defense of the actions in which the judgments were recovered, and the firm rendered services and incurred expenses to and for the company in the defense of the actions, the aggregate value of which did not exceed $150.

On September 26, 1896, Libera & Mlnazek, as a firm, per hand of Libera, and each of the members of the firm individually, signed a written instrument whereby as co-partners, also jointly and severally, they surrendered and delivered the policy to the company, and released it from all liability to them, or either of them, on account thereof. After the execution of the release, it was, with the consent of Mlnazek, placed in the hands of Libera to be delivered. The company did not at this or any other time agree, as alleged in the complaint, or otherwise, with the firm, or with either member thereof, to pay the firm $500 if they would release it from all claims they

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had against it by reason of the services and expenses so rendered and incurred.

The question whether Mlnazek was induced to sign this release by the fraud of the company and Libera was submitted to the jury, which found, in effect, that the agent of the company and Libera, to induce Mlnazek to sign the release, falsely and fraudulently represented to him that the same contained a statement that the firm of Libera & Mlnazek thereby, in consideration of $500, released the company from all claims and demands which the firm had against the company for services rendered to it, but in all other respects the company should be bound by the terms of its insurance policy issued to the firm; that he believed the representations to be true, and was thereby influenced to sign the release himself, and to consent to the signing thereof with the name of the firm. Libera retained possession of the instrument and policy for some four days, refusing in the meantime to deliver them to the company on the payment of $500, but demanded $1,000 for them, which sum the company finally paid him October 1, 1896, for their delivery to it, and such payment was made as a consideration for a release as expressed in such instrument, and for no other purpose. Some three weeks thereafter Libera paid to Mlnazek $225, only, as his share of such consideration, which sum he retained until July 16, 1898, when he tendered it to the company, and notified it of his intention to rescind the release. The tender was refused. The trial court, upon these facts, found as a conclusion of law that the plaintiff was not entitled to any relief, and ordered judgment for the defendants.

The plaintiff urges that the court erred in finding that the company did not enter into a contract with him to pay the firm $500 for a release of their claim for services and expenses of the firm in defending the action. This claim is based upon the proposition that the special finding of the jury necessarily includes a finding that such a contract was made; that the finding of the court to the contrary is a nullity, because the verdict must control. The claim of the defendants is, in effect, that the making of the alleged contract was an issue in the case that was reserved for trial by the court, and tried by it, and that the question submitted to the jury related

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solely to the alleged misrepresentations as to the contents of the release, and the effect thereof upon plaintiff.

It may be conceded, for the purpose of this appeal, that the contention of the plaintiff is correct; but it does not follow from this that the plaintiff is entitled to have the contract reformed. The subject-matter of the release was a firm asset, which was in form released to the company for the consideration therein expressed. The release is perfectly valid as to Libera, who was in no manner imposed upon. He acted with full knowledge in the premises; therefore it cannot be reformed as to him. If it is reformed as to the plaintiff alone, then we would have a firm contract which as to one of the parties only releases the company from all claims on account of the services and expenses of the firm rendered and incurred to and for the company, while as to the other partner it releases the company from all liability on account of its policy to the firm,—a separate and independent firm asset. The result would be a contract which none of the parties ever intended to make. Equity will not make a new and anomalous contract for parties under the guise of reforming a written instrument improperly drawn through fraud. Clearly, the plaintiff is not entitled to have the release reformed as prayed for.

It does not, however, follow that he is remediless, for he is entitled to obtain the very right of which he was deprived through fraud. Now, what was that right? It was the right to recover the value of his actual share of the firm demand released. Whether such share was of more than nominal value depends upon the state of the accounts between the partners. There is nothing in the complaint or findings of fact indicating the terms of the co-partnership as to the ownership of the firm assets, or as to the division of the profits or losses between the respective members of the firm, or as to the state of the partnership accounts, or as to the value of the plaintiff's actual interest in the firm asset surrendered. It may be conceded, without so deciding, that, if the plaintiff had established the fact that he had a substantial interest in the surrendered asset, equity would, as to him, cancel the release, or so limit its operation that it would not be an obstruction to the assertion of his actual interest in the policy as a firm asset. But a party invoking the aid

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of equity must show affirmatively that he is entitled to the relief he asks. This the plaintiff has not done.

Whatever loss, if any, a final settlement of the partnership accounts may show that the plaintiff has sustained by reason of the fraud practiced upon him by the company and his partner he is entitled to have made good to him; no more, no less. See Sweet v. Morrison, 103 N. Y. 235, 8 N. E. 396. It would seem that he had an adequate legal remedy by an action for damages for the fraud of the company and his partner, whereby he was deprived of his interest in the policy. However this may be, we are of the opinion that the facts found by the trial court and jury do not entitle the plaintiff to have the contract reformed or cancelled.

Judgment affirmed.

GEORGE R. KING and Another v. CITY OF DULUTH.

November 27, 1899.

78 155
s81 183

Nos. 11,793—(91).

Contract—Price of Extra Work—Charge to Jury.

The parties hereto entered into a written contract whereby the plaintiffs agreed to do certain work in the construction of a system of waterworks for the city. The contract provided that the city engineer should be the sole arbitrator as to all matters of dispute which might arise as to the execution of the work; and, further, that in no case should the contractors be entitled to recover for any extra work or alterations in the plans, unless the price therefor was first determined by the engineer and mutually agreed on in writing by the parties. Changes in the plan of the work were made which necessitated extra work, as plaintiffs claim, and they demanded that the engineer fix the price therefor, and that a written contract be entered into for the doing of the work. The engineer refused to so do. It was necessary that the extra work should be done in order to execute the contract, and the plaintiffs did it. *Held*, that the contract as to extra work was valid, and that the plaintiffs cannot recover compensation therefor without showing a compliance therewith, or that the engineer acted in the premises arbitrarily or dishonestly, or by reason of a demonstrable mistake of fact.

Action in the district court for St. Louis county to recover a bal-

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ance due under a contract and a further sum for extra work and materials. The case was tried before Ensign, J., and a jury, which rendered a verdict in favor of plaintiff for $13,334.90; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

J. B. Richards, for appellant.

No recovery for extra work can be had, unless it appears that the compensation has been determined as provided in the contract, or that this provision has been waived by defendant. City of Duluth v. McDonnell, 61 Minn. 288; Shaw v. First Baptist Church, 44 Minn. 22; Johnson v. Howard, 20 Minn. 322 (370); St. Paul & N. P. Ry. Co. v. Bradbury, 42 Minn. 222; Heard v. Dooly, 101 Ga. 619; O'Keefe v. Corporation, 59 Conn. 551; Vanderwerker v. Vermont, 27 Vt. 125, 133; Potter v. Holmes, 65 Minn. 377, 380; Weeks v. O'Brien, 141 N. Y. 199; President v. Pennsylvania, 50 N. Y. 250. There was no waiver by defendant. O'Keefe v. Corporation, supra; Ashley v. Henahan, 56 Oh. St. 559; Weeks v. O'Brien, supra; Stuart v. City, 125 Mass. 102. The contract for the stated consideration of $32,000 was not abandoned, and a new contract made, because the contract provided for everything done and the manner of doing it. St. Paul & N. P. Ry. Co. v. Bradbury, supra; O'Keefe v. Corporation, supra; Ashley v. Henahan, supra. Unless plaintiffs intended to abandon their claim for extra compensation, they should have refused to do the work when ordered by the engineer, and have stood on their legal rights. See also U. S. v. Behan, 110 U. S. 338; Anvil M. Co. v. Humble, 153 U. S. 540; McElwee v. Bridgeport L. & Imp. Co., 54 Fed. 627; Lake Shore v. Richards, 152 Ill. 59.

J. L. Washburn and *W. D. Bailey*, for respondents.

Where a person has been agreed on in a contract, who is to fix the price or give an architect's certificate, if he refuses on demand the contractor may do the work and recover a reasonable value. Especially is this true where the contract provides that the engineer may make alterations or additions without affecting the terms or validity of the contract, and that the contractor shall receive reasonable compensation not to exceed prices specified, the prices to be determined by the engineer. Potter v. Holmes, 72 Minn. 153, 157;

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Starkey v. De Graff, 22 Minn. 431; St. Louis v. Kerr, 153 Ill. 182; Thomas v. Fleury, 26 N. Y. 26; Flaherty v. Miner, 123 N. Y. 382; Peck v. State, 137 N. Y. 372; Doll v. Noble, 116 N. Y. 230; Bowery v. Mayor, 63 N. Y. 336; Nolan v. Whitney, 88 N. Y. 648; Bentley v. Davidson, 74 Wis. 420; Cunningham v. Fourth, 159 Pa. St. 620; U. S. v. Gibbons, 109 U. S. 200.

START, C. J.

The parties hereto, on December 16, 1896, entered into a written contract whereby the plaintiffs, for the sum of $32,000, to be paid by the city, agreed to do certain specified work for it in connection with a system of waterworks for the city. The contract was performed by the plaintiffs to the satisfaction and acceptance of the city, and this action was brought to recover a balance of $3,055 due on the contract, and the further sum of $13,837.80 for extra work and material done and furnished to the city. The jury returned a verdict for the plaintiffs for $13,334.90, and the defendant appealed from an order denying its motion for a new trial.

The complaint alleged four causes of action. The first was for the balance of the contract price, as to which the trial court rightly instructed the jury that the plaintiffs were entitled to recover the amount claimed. The second was dismissed by the court, and its ruling is not here complained of. The third was a claim for $247.80, consisting of three items,—the chipping of pipes to make them fit the joints, the caulking and tightening of joints, and the use by the city of the plaintiffs' men and outfit in making an inspection of the work. The plaintiffs claimed that this was no part of their contract, and that the services were rendered at the request of the city, as an independent undertaking. We find no error in the rulings of the trial court as to this cause of action.

The fourth was a claim for $9,824 for placing 1,228 cubic yards of broken stone in foundation under and on both sides the intake pipe, at the schedule price of $8 per cubic yard, less a credit of $259 for sand, which the plaintiffs were not required to use by reason of a change in the plans. The real controversy in this case arises over this alleged cause of action. A statement of the nature of the work provided for by the contract, and of the terms of the contract, is

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essential to a clear understanding of the claims of the respective parties.

The city commenced the construction of an intake pipe to be used in connection with its system of waterworks, but before the work was completed the city concluded to let the balance of the work by contract. Plans and specifications and profiles, showing the work done by the city and that remaining to be done, were made, from which it appears that the work to be done was to continue a tunnel commenced by the city until it should open into the bottom of the lake, and then to lay and rivet a 60-inch steel pipe out some 1,500 feet, and place an anchor crib at the end thereof. The original profile showed that the bottom of the lake upon which the pipe was to be laid was for the greater part of its length a smooth surface of sand. Such plans and profiles were the basis upon which contractors were invited to bid for the work. The plaintiffs were the lowest bidders, and a written contract was entered into by the parties for the execution of the work, the here material terms of which are these:

The plaintiffs were to take up the work in all of its parts, as partly completed by the city, and finish the same, in accordance with the plans and specifications, and cover the intake pipe for its entire length with at least five feet of sand or gravel, and place riprap of rock around the submerged crib, and along the line of the intake pipe, as directed, great care to be taken to insure the pipe resting solidly on its foundation and being level and plumb; all work to be done under the direction and superintendence of the city engineer, who was to be sole judge and arbitrator as to the quantity and quality of all material and workmanship required under the contract; and as to all matters of doubt or dispute as to the meaning of the plan, or of any words or terms used in the specifications, his opinion was to be final and binding on the parties.

"The engineer shall have the right, subject to the provisions of the city charter, to make any alterations and changes, such as he may deem proper, at any time during the prosecution of the works in any line, grade, plan, detail, depth, form, or dimensions, of any part or portion of the work or works, or may add to the work contemplated in this contract such additional work as may be necessary

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or desirable in order to fully complete the work commenced by this contract, or may omit any portion which may seem desirable. In the event of any changes, alterations, additions, or deductions being ordered by the engineer (and the engineer shall have full power to make and order the same, without in any way affecting the terms or validity of this contract), the contractor shall be entitled to receive fair and reasonable compensation wherever changes are made whereby the amount of work to be performed is increased beyond what was originally intended, and beyond what is called for under the terms of this specification. The full amount of such compensation must, however, in every case, be determined by the engineer, and mutually agreed upon in writing by the contractor and board of public works, before commencing such extra work or alteration; otherwise, no allowance shall be made the contractor in respect thereof, and he agrees hereby to forfeit all claim to extra compensation therefor or for damages incurred."

The contract also provided that, in case the engineer ordered additional work, the price of riprapping should not exceed $1.50 per cubic yard, and for rock in foundation under water not to exceed $8 per cubic yard.

It is admitted that the plaintiffs entered upon the work, and that when they had laid the seventh joint of pipe from the shore, and had placed around and along it the sand specified in and called for by the specifications, the action of the water upon the pipe so laid was such that it washed away the sand, broke the joint off, and rolled and moved the pipe to a considerable distance from its proper place; that, upon discovering this fact, the plaintiffs notified defendant, and advised it that the method provided in and by the terms of the contract for holding the pipe in position beyond the trench was not sufficient, and that some other method should be provided. Thereupon the defendant caused the pipe and its position to be inspected, and through its agent, the city engineer, ordered the plaintiffs to prepare and place broken rock around and along the pipe from the seventh joint outward, in place of the sand provided for in the original specifications and profile. The evidence tends to show that, as the work progressed, the bottom of the lake on which the pipe was to rest was found to be materially different from what it was represented on the original profile, in that it was a rough surface of rock, and that the plaintiffs were required by the engineer

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to level it down, and lay a foundation of rock, making a bed on which to lay the pipe, and to continue the rockwork up its sides half or two-thirds of the way, which was done by divers under 25 to 70 feet of water. And, further, that, at the time the changes were made in the plan and the additional work ordered, the plaintiffs made a demand upon the city engineer that he fix the price for doing the work, and of the board of public works that it enter into a written contract for it. But the engineer refused to fix the price, and ordered them to proceed with the work as directed, which they did, insisting that it was extra work, and insisting, on their repeated demand, that he fix the price, so that a written contract therefor could be made. There was evidence, as claimed by the defendant, tending to show that the alleged rock foundation and wall along the side of the pipe was riprap work, and covered by the provisions of the contract as to the foundation for the pipe and the placing of riprapping along the intake pipe, as directed, and that the engineer so decided, and for that reason declined to fix a price for the work.

The claim of the city on the trial was that the provisions of the contract requiring that the price for all extra work ordered by the engineer should be fixed by him, and a written contract therefor made, was valid, and, it not having been complied with, there could be no recovery on the fourth cause of action; that the plaintiffs' remedy for the refusal of the engineer to recognize the work ordered as extra, and to fix a price therefor, was to refuse to do the work; and, further, that, in any event, the work was riprapping, for which no more than $1.50 per cubic yard could be recovered. The claim of the plaintiffs was to the effect that the work ordered was extra, and was "rock in foundation under water," as the term was used in the contract, for which they were entitled to recover not exceeding $8 per cubic yard. The trial court instructed the jury that

"The engineer, under the terms of this contract, was an arbitrator between these parties; stood in relation to these parties as deciding questions for and against the parties; stood in the position somewhat of a judge in relation to them; and he was to act as a judge and jury always seek to act, fairly and impartially between the parties, recognizing all rights of the contractor under the contract, and to an equal extent recognizing all rights of the city under the contract." And, further, "If you find that there was a change in

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this contract, and if you find that that change increased the work of the contractor, that the contractor demanded of the engineer that he fix the compensation for that work, and that the engineer refused to so fix it, then the plaintiffs might go on and might maintain an action under the contract for that work. This is the very gist and foundation of this action." Also: "If you find that such change imposed labor upon the plaintiffs beyond what was intended, and beyond what was called for, under the contract, and that the plaintiffs demanded of the city engineer that he determine under the contract the full amount of compensation for such increased labor occasioned by the change aforesaid, and the city engineer refused to so determine such compensation, then the plaintiffs are entitled to recover of the defendant the fair and reasonable price for such additional labor as, under the evidence, they are entitled to recover, making due and reasonable allowance for the costs and value of the sand in place so omitted from said work."

The question whether the engineer, in deciding that the work ordered was not extra, and in refusing to fix a price therefor, did so arbitrarily or fraudulently, or by reason of a demonstrable mistake of fact, was not submitted to the jury. Nor was the question suggested to the jury other than as stated (if at all) in the first instruction above set forth.

The giving of the second and third instructions we have quoted is assigned as error, and raises all of the questions we deem it necessary to consider as to the fourth cause of action.

The contention of the defendant that the plaintiffs' only remedy, if dissatisfied with the action of the engineer, was to refuse to do the work, is untenable; for it clearly appears from the evidence that it was impossible to go on and complete the contract without doing the work which they claim to be extra, and which the engineer, by the very terms of the contract, had a right to order them to do. Equally unsound is the claim of the plaintiffs that the engineer refused to act in the premises at all, and therefore the case falls within the rule stated in Potter v. Holmes, 72 Minn. 153, 75 N. W. 591; for in this case the engineer did act, and did decide that the work ordered was not extra work, within the meaning of the contract, and therefore refused to fix a price for it. The provisions of the contract in question are valid and wholesome, and are binding upon the plaintiffs, and they cannot recover for extra work without

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showing a compliance therewith, or that the engineer acted in the premises arbitrarily or dishonestly, or upon a demonstrable mistake of fact. Shaw v. First Baptist Church, 44 Minn. 22, 46 N. W. 146; City of Duluth v. McDonnell, 61 Minn. 288, 63 N. W. 727.

But the mere fact that they did the work as ordered; that the engineer refused to recognize their claim that it was extra, and refused their demand to fix a price for it; and that the evidence is sufficient to justify a finding or verdict that it was extra work, and that the engineer ought to have complied with their demand,—is not sufficient to entitle them to recover. To hold otherwise would be practically to emasculate the provisions, and permit the contractor to appeal in every case from the judgment and decision of the engineer to a jury. On the other hand, such provisions, while valid and necessary to prevent frauds upon the public treasury, must not be used, by arbitrary or dishonest or incompetent engineers, to oppress honest contractors, and to cheat them out of their just dues. Such contractors may show, in justification of a noncompliance with the contract provisions in question, that they did all that they could do to comply therewith, and that the action of the engineer in the premises was arbitrary or fraudulent or dishonest or by reason of a demonstrable mistake of fact. If they are unable to so satisfy the court or jury, they cannot recover for extra work.

Now, the instructions to the jury, complained of, wholly omitted this essential element of the plaintiffs' case, and permitted a recovery by the plaintiffs, in face of the provisions of the contract, if the jury found that a change in the plan of the work was made which in fact involved the doing of extra work, that the plaintiffs did it as directed, and that the engineer refused their demand to fix the price therefor. The instructions were therefore erroneous, and the giving of them reversible error, unless it appears from the undisputed evidence, as a matter of law, that the city engineer acted in the premises arbitrarily or fraudulently, or by reason of a demonstrable mistake of fact. If such be the case, of course, the error was harmless.

Our conclusion, based upon an examination of the entire record, is this: Considering the terms of the written contract and the profile, which was a part of it, and with reference to which the pro-

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visions of the contract were adopted, and the undisputed evidence that the bottom of the lake proved to be different from what was represented, and that the sand provided for in the contract proved wholly inadequate to protect the pipes, and that these facts rendered necessary a radical change of plan, we are of the opinion that it conclusively appears that the engineer, in deciding that all of the work declared on in the fourth cause of action was included in the contract, and that none of it was extra work (we have no reference to the price to be allowed therefor), must have acted arbitrarily or upon a demonstrable mistake of fact. This is especially true as to the rock foundation or bed for the pipe. But, as this is not necessarily true as to all the work claimed for in the fourth cause of action, we cannot hold that the instruction of the court complained of was error without prejudice, and for that reason the order must be reversed, and a new trial granted. So ordered.

STATE ex rel. JOHN G. McDONOUGH v. BARTHOLOMEW O'MALLEY and Another.

November 27, 1899.

Nos. 11,811—(107).

Custody of Children—Father or Mother.

Appeal by relator from an order of the district court for Ramsey county vacating a writ of habeas corpus and ordering that respondent Nora B. McDonough have until further order of the court care, custody, and control of her minor children. Affirmed.

John W. Willis, for appellant.

Dickson & Donnelly, for respondents.

PER CURIAM.

The relator, John G. McDonough, and the respondent Nora B. McDonough are husband and wife, living separate and apart. This controversy relates to the custody of their infant children, John George McDonough, who is two years and eleven months old, and Robert Allen McDonough, of the age of one year and four months.

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They are now in the custody of their mother, who is living with her father, the respondent Bartholomew O'Malley. Upon the relation of their father, a writ of habeas corpus was issued by the district court of the county of Ramsey, and the children brought before the court; and such proceedings were had therein on the return of the writ that the court made its order awarding the care, custody, and control of the children to their mother until the further order of the court. The relator appealed from the order to this court, and by stipulation of the parties in open court the cause was submitted to this court upon the evidence and proceedings had in the district court.

Having duly considered the evidence, we are of the opinion that neither of the parties is wholly free from blame for the unfortunate estrangement which has resulted in their temporary (it is to be hoped) separation. There seems to be no reason why the parties may not become reconciled, if the relator will provide an independ ent home for himself, wife, and children. However that may be, we find that the interests of the children, in view of their tender years, will be best served by leaving them for the present in the care and control of their mother. It is therefore ordered that Nora B. McDonough have and retain the care, custody, and control of her minor children, John George McDonough and Robert Allen McDonough, and of each of them, until the further order of the district court of the county of Ramsey. Ordered, further, that their father, John G. McDonough, be permitted to freely see and visit with his children at reasonable times twice each week, not exceeding one hour at each visit; but he is forbidden to remove them, or either of them, from the custody and control of their mother, or to interfere therewith. Let judgment be so entered.

COLLINS, J. (dissenting).

I dissent. After several quarrels, and one separation, the wife left her husband and the children on February 15, 1899, and went to her father's house, in the same city. She took all of her clothing, and some of that belonging to the children; taking off from one of them its heavy underwear, and replacing it with lighter garments. She remained at her father's one month, but made no attempt to

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see the children. She then went to a distant part of the state, and remained until May 4. That afternoon, immediately upon her return, she went to the house where she had left the children, taking with her a brother and sister. A sister of her husband, seeing the party approaching the kitchen door, locked it, whereupon the wife raised a window, climbed in and over a table covered with dishes, and took the children out of the house, and to her father's. I object to such conduct on the part of any parent, and protest against its indorsement, as has been done in this case by the order of this court. The mother left the children with the father, and was away three months. Four weeks of this time she was in the same city, but made no effort to see them, or even to learn of their welfare. To all appearances, she had abandoned them quite as completely as she had their father. She committed a trespass in order to obtain possession of them, and a very serious breach of the peace would have been the result, had not her husband's mother and sister manifested great discretion and forbearance. In my judgment, the circumstances are such that the children should, in these proceedings, be remanded to the care and custody of their father, as an indication of the disapproval by this court of her conduct when taking the law into her own hands, and by force removing them from the care of those with whom she had herself left them,—with permission, of course, for the mother to proceed, in an orderly way, to obtain the care and custody of them. The community in which these people reside is entitled to have the law obeyed, and a father has some rights with respect to his children, which the courts should not entirely wipe out of existence.

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STATE ex rel. ALEXANDER W. SCOTT v. FRED L. LOWELL and Another.

November 27, 1899.

Nos. 11,955—(218).

Marriage under Statutory Age—G. S. 1894, § 4769.

G. S. 1894, § 4769, relating to age of competency for contracting marriage, construed, and *held*, that the marriage of a person who has not reached the age of statutory competency, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of consent, to be exercised at any time before reaching such age, or afterwards if the parties have not voluntarily cohabited after reaching such age.

Same—Valid until Set Aside.

Such a marriage being voidable, it is treated as valid for all civil purposes until so set aside.

Release of Minor from Control of Parent.

Marriage emancipates a minor child from parental control. Accordingly it is *held* that, where a girl only 13 years and 11 months old marries, her father has no legal right to restrain her from living with her husband, if she so elects.

Appeal by relator from an order of the district court for Hennepin county, Brooks, J., discharging a writ of habeas corpus and remanding Sadie Scott, the wife of relator, to the care, custody, and control of respondent Fred L. Lowell, her father. On a trial de novo in the supreme court, judgment for relator.

Chas. G. Laybourn, for relator.

J. N. Bearnes, for respondent.

START, C. J.[1]

On October 18, 1899, the relator, Alexander W. Scott, a man 32 years of age, and Sadie Lowell, a girl then only 13 years and 11 months old, the daughter of the respondent Fred L. Lowell, were married, without the consent of her parents, in due form, by an ordained minister of the gospel, upon the presentation of a license

[1] COLLINS, J., did not sit.

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in due form, issued by the clerk of the proper county. Cohabitation as husband and wife followed the marriage, but on the next day thereafter the father went to the house of the husband, and forcibly took his daughter away, against her will and wishes, and detained her. Thereupon a writ of habeas corpus in her behalf was sued out of the district court for the county of Hennepin, on the relation of her husband. Upon a hearing on the return of the writ the court discharged the writ, and remanded the wife to the custody and control of her father, from which order the relator appealed to this court. The cause was here heard de novo, pursuant to Laws 1895, c. 327. A referee was appointed to take and report the evidence, who did so.

The evidence establishes the facts we have already stated, and, further, that the husband is an industrious man, who has a home, and is able to support a wife and family, and that his wife is ready and anxious to return to and live with him as her husband, if relieved from the restraint of her father. The wisdom of this marriage, or the propriety of the relator's conduct in inducing this young girl to marry him, are questions which it is not our province to discuss or characterize. Moralize as we may, the fact remains that the parties were married, and the marriage has been consummated; hence we are now simply to inquire dispassionately as to the legal status of the parties. The question presented by the record is, was this marriage void or voidable, and, if the latter, did it emancipate the wife from the custody of her father?

The common law established the age of consent to the marriage contract at 14 years for males and 12 years for females, but our statute (G. S. 1894, § 4769) provides that

"Every male person who has attained the full age of eighteen years, and every female who has attained the full age of fifteen years, is capable in law of contracting marriage, if otherwise competent."

But the statute does not declare that, if a marriage is entered into when one or both of the parties are under the age limit prescribed, the marriage shall be void. It does, however, impose restrictions and penalties upon public officers and clergymen, for the purpose of preventing, so far as possible, such marriages being solemnized; but

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the statute has, for wise reasons, stopped short of declaring such marriages void. Such being the case, we hold, upon principle and authority, that the marriage of a person who has not reached the age of competency as established by the statute, but is competent by the common law, is not void, but voidable only by a judicial decree of nullity at the election of the party under the age of legal consent, to be exercised at any time before reaching such age, or afterwards if the parties have not voluntarily cohabited as husband and wife after reaching the age of consent. G. S. 1894, §§ 4769, 4786, 4788, 4789; Schouler, Dom. Rel. § 20; 14 Am. & Eng. Enc. 488; 1 Bishop, Mar. & Div. § 145; Beggs v. State, 55 Ala. 108; Eliot v. Eliot, 77 Wis. 634, 46 N. W. 806; State v. Cone, 86 Wis. 498, 57 N. W. 50. The marriage being voidable, it must be treated as valid for all civil purposes until annulled by judicial decree. Schouler, Dom. Rel. § 14.

Now, the question of the right of the respondent, as father of the relator's wife, to restrain her from going to her husband, must be determined upon the basis that the marriage is valid. The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. 1 Bishop, Mar. & Div. § 275; Schouler, Dom. Rel. § 267. The correctness of this proposition as a general rule is admitted, but it is claimed on behalf of the father that it does not apply to this case, because the husband cannot enforce his marital rights without the consent of the wife, and that she cannot, by giving her consent to a voidable marriage, free herself from parental control, and, further, that she cannot do so until she reaches the age when she can legally affirm the marriage; that to hold otherwise would enable a girl under twelve and over seven years of age to emancipate herself by consenting to a voidable marriage. This course of reasoning ignores the fact that the marriage, until set aside, must be, for all civil purposes, treated as valid, and that it is her new and inconsistent status as a wife which emancipates her from the control of her father. A wife—and this girl must be regarded as such for the

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purposes of this case—certainly has the capacity to consent to live with her husband.

Whether the marriage of a child under twelve years of age and over seven years would emancipate her, we need not determine. It would seem, however, that the operation of natural laws would incapacitate her in fact from assuming the new and inconsistent relations which emancipate a minor from parental control. Our conclusion is that the respondent is not legally entitled to detain his daughter, if she elects to return and live with her husband.

Therefore it is ordered that Sadie Scott, the wife of the relator, Alexander W. Scott, be freed from the restraint of her father, the respondent Fred L. Lowell, and that he surrender her to the relator, if she elects to live with him as her husband. Let judgment be so entered.

CHARLES J. MONFORT and Others v. JOSEPH A. WHEELOCK and Others.

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November 28, 1899.

Nos. 11,735—(112).

City of St. Paul—Workhouse Directors—Capacity to Sue.

Held, the board of St. Paul workhouse directors, appointed and acting under Sp. Laws 1881, c. 190, are mere city officers, and not a body corporate having power to sue and be sued as such, but the suit must be brought in the name of the city.

Action in the district court for Ramsey county by plaintiffs, as the Board of St. Paul Workhouse Directors, against defendants, as the Board of Park Commissioners of St. Paul, and Frederick Nussbaumer, superintendent of said board, to enjoin defendants from interfering with a certain tract of land. From an order, Jaggard, J., sustaining a demurrer to the complaint, plaintiffs appealed. Affirmed.

Walter L. Chapin, for appellants.

Plaintiffs have capacity to sue. Public officers have power to sue commensurate with the proper protection of themselves and prop-

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erty in performance of public duties. Mechem, Pub. Off. §§ 893–896; Rouse v. Moore, 18 Johns. 406; Supervisor v. Stimson, 4 Hill (N. Y.) 136; Todd v. Birdsall, 1 Cow. 260; Haynes v. Butler, 30 Ark. 69; County v. Bunbury, 45 Mich. 79. Plaintiffs are proper parties to maintain the action. Mere possession is sufficient to maintain an action against intruders, who, not showing in themselves a right to possession, cannot question the lawfulness of the prior possession of another. Christy v. Scott, 14 How. 282, 292; Burt v. Panjaud, 99 U. S. 180; Wilson v. Glen, 68 Ala. 383, 386; Sedgwick & Wait, Tit. § 718. Plaintiffs had not only possession, but a statutory right thereto. If defendants are intruders or trespassers, injunction will lie. Gustafson v. Hamm, 56 Minn. 334; 3 Pomeroy, Eq. Jur. §§ 1347, 1348.

James E. Markham and *Carl Taylor*, for respondents.

CANTY, J.

The city workhouse of St. Paul was located on a tract of land originally purchased, under and pursuant to Sp. Laws 1872, c. 8, for park purposes. The city council attempted to set aside 40 acres of that land for a workhouse site. After the park board was created and organized under Sp. Laws 1891, c. 35, the lands held by the city for park purposes passed under the control of that board. That board passed a resolution purporting to cut down the workhouse site to 15 acres in area (the 15-acre tract so designated includes the land on which the workhouse stands), and declaring the rest of the 40-acre tract to be appropriated for park purposes. The park board threatens to take possession of said balance of the 40 acres, and this action was brought to restrain it from doing so. The action is brought by plaintiffs, as the board of workhouse directors, against the board of park commissioners and the superintendent of that board. Defendants demurred to the complaint, and plaintiffs appeal from an order sustaining the demurrer.

One of the grounds for demurrer is that plaintiffs have not legal capacity to sue, and this is the only ground which we deem it necessary to consider.

Sp. Laws 1881, c. 190, § 1, provides that

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"The common council of the city of St. Paul is hereby authorized and empowered to establish, erect and maintain a workhouse."

Section 2 provides:

"The direction, management and control of such workhouse, and the maintenance and care of the convicts therein shall be vested in a board of five directors who shall be styled the 'board of St. Paul workhouse directors,' and said directors shall serve without compensation."

Section 3 provides that the board shall be appointed by the mayor, with the advice and consent of the common council.

Section 4 provides:

"The said board of directors, with the consent and approval of the common council, shall have the power to purchase real estate, at a cost not to exceed $3,000, erect buildings for a workhouse, workshops, providing the same with the necessary machinery and tools, with power to adopt rules for the regulation and discipline of said workhouse."

Section 7 provides:

"The said board of directors shall elect one (1) of their own number president, some suitable person as secretary, the treasurer of the city of St. Paul is hereby declared to be ex-officio treasurer of the said board, and the city comptroller is hereby declared to be ex-officio the comptroller of said board."

Section 8 provides that the superintendent of the workhouse shall have entire control and management of its affairs, and shall obey and carry out the rules and instructions of the board.

Section 9 authorizes the city council to expend not exceeding $30,000 for the purpose of purchasing the land and the erection of the buildings contemplated by the act, and to issue bonds therefor.

There is nothing in the act expressly declaring the board a body corporate, or providing that it may sue or be sued. In our opinion, the board of St. Paul workhouse directors are mere officers and agents of the city of St. Paul, and not an independent corporation, and therefore cannot maintain this action. In the case of a quasi municipal corporation the power to sue will be implied when there would otherwise be no corporation or person who could maintain the action. Commissioners v. Perry, 5 Ohio, 56, 64. But the power

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of a government or municipal officer or board to maintain a suit in his or its own name is strictly construed when the state, county, or city for which the officer or board acts has power to bring the suit. See Commissioners v. Perry, supra; Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652; 1 Dillon, Mun. Corp. (4th Ed.) § 237, note 4.

Order affirmed.

EDWARD J. HODGSON v. ST. PAUL PLOW COMPANY and Another.

November 28, 1899.

Nos. 11,789—(65).

Trust Fund—Master and Servant—Liability of Servant.

Plaintiff claims that it has traced its property as a trust fund into the hands of the defendant Power, who, as servant, received it from his master, and held and disbursed it under his master's orders, with notice of plaintiff's rights, and knowledge that his master was insolvent. *Held*, conceding, without deciding, that plaintiff has sufficiently traced and identified the trust fund, the master, not the servant, had the possession and control of the fund, and the servant is not liable for converting the same.

Action in the district court for Ramsey county by plaintiff as receiver of the Savings Bank of St. Paul against the St. Paul Plow Company and Charles M. Power to recover $2,000 damages for conversion of the proceeds of a promissory note. The case was tried before Bunn, J., who found in favor of defendants; and from a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Michael & Johnston, for appellant.

An agent or servant who, while in the employ of his principal or master, converts the property of a third person with knowledge of the facts is liable. Leuthold v. Fairchild, 35 Minn. 99. While some authorities hold the agent liable regardless of his ignorance of the rights of the owner, all agree in holding him liable where he acts with knowledge. 26 Am. & Eng. Enc. 779; Mechem, Ag. §§

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573, 574. The fact that Power did not profit personally is not a defense. Hill v. Campbell, 54 Neb. 59; McPheters v. Page, 83 Me. 234; Wing v. Milliken, 91 Me. 387.

Horton & Denegre, for respondents.

Defendant Power did not take into his possession the money with intent to appropriate it to his own use or to deprive plaintiff of it. He might have been a mere depositary for his principal. He is not liable in trover. Loring v. Mulcahy, 3 Allen, 575; Boobier v. Boobier, 39 Me. 406; Polley v. Lenox, 2 Allen, 182, 184.

CANTY, J.[1]

The St. Paul Plow Company sold a quantity of merchandise to a certain customer, received therefor several of the promissory notes of the customer, and thereafter, on December 15, 1895, sold and transferred to the plaintiff bank one of these notes for the sum of $2,333.33. A short time before the note fell due, plaintiff delivered the note to the Bank of Minnesota for collection, in order to aid the efforts of the plow company to pay the note, or substitute other security for it, and then surrender it and said other notes to said customer, and take back from him the goods sold to him, and sell these goods, or a part of them, to a second customer, and receive other security from him. After plaintiff's note was received as aforesaid by the Bank of Minnesota, it delivered the note to the plow company; the latter surrendered it, with said other notes, to said customer, received from him therefor merchandise of the value of $12,000, sold a part of the same to said second customer for $2,700, and received his note for that amount. In the meantime the amount due plaintiff had been reduced to $2,000 by reason of a payment made to it by the plow company. Thereafter, on February 1, 1897, the plow company collected the full amount of the latter note from the second customer.

On January 20, 1897, the defendant Power was appointed general manager of the plow company, and he acted as such manager until March 11, 1897, when the plow company made an assignment in insolvency under the laws of this state for the benefit of its credit-

[1] BUCK, J., absent, took no part.

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ors. Power, as such general manager, received the amount so paid on the last-named note. He then deposited $2,000 of the same in a bank, and received a certificate of deposit for the same, payable to the plow company, and used the balance of the money in paying the debts and expenses of the plow company. Thereafter, on or prior to February 20, 1897, Power notified plaintiff that he had so deposited the $2,000 as aforesaid, and thereupon plaintiff demanded from Power the certificate of deposit, but he refused to deliver the same to plaintiff. Shortly afterwards he surrendered the certificate, drew out the deposit, and before March 1, 1897, paid out all of the $2,000 in payment of other debts of the plow company, pursuant to its order. During all the time from January 20, 1897, until the plow company made its assignment, it was insolvent, and during all of that time Power knew that fact, and was informed of all the foregoing facts as they occurred, and knew all of the same at the time he drew out said deposit and disbursed the same in payment of the other debts of the plow company. It does not appear what became of the balance of the $12,000 worth of merchandise which was received back from the first customer.

On substantially this state of facts, plaintiff seeks to trace as a trust fund its note, or the proceeds thereof, into the certificate of deposit, and to have it held that the certificate of deposit was the property of plaintiff, and it demands judgment against Power for $2,000, the amount of the same, as damages for converting the same. The trial court held that plaintiff's note, or the proceeds thereof, could not be sufficiently traced as a trust fund into the certificate of deposit, and found for defendant Power. Plaintiff appeals from the judgment.

We have some doubt as to the correctness of the holding of the learned trial court that such trust fund could not properly be traced into the certificate of deposit, but we do not deem it necessary to decide that question. There is, in our opinion, another reason why the judgment should be affirmed.

Power was a mere servant of the plow company. The court finds that one Dawson was its vice president, and engaged in the management of its affairs. Whether such an executive officer would be liable in such a case as this, we need not consider. The court finds

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that Power "was duly appointed general manager," but this does not show that he was anything more than a mere servant. In contemplation of law, such a servant has no possession of or title to his master's property, and, if it was wrongfully taken away from him, he could not maintain either replevin or trover for it. Wells, Repl. §§ 115, 644; 26 Am. & Eng. Enc. 749. A servant may be a joint trespasser or a joint tort feasor in assisting his master in taking the goods wrongfully, but the servant is not liable for merely holding and refusing to deliver up goods received by him from his master, and held by him under the master's orders. Wells, Repl. § 144. See also McLennan v. Minneapolis & N. El. Co., 57 Minn. 317, 59 N. W. 628. The servant is not even a proper party defendant in such a case. Wells, Repl. § 144. The servants of the party in possession need not be made parties defendant in an action of ejectment or forcible entry (Bagley v. Sternberg, 34 Minn. 470, 26 N. W. 602), and may be removed from the premises in executing a writ of possession, though not made parties or named in the writ (2 Freeman, Exns. § 475).

If, while the $2,000 was still on deposit, and Power, as such servant, had the custody of the certificate of deposit, plaintiff had brought its action against him alone to have a trust declared in its favor upon such certificate, we are clearly of the opinion that the action could not be maintained. It would be useless to bring such an action. The plow company might discharge Power the next day after the action was commenced. Thereafter his relations to the certificate of deposit would be the same as those of any other stranger, and the action must necessarily be abortive. If plaintiff could not maintain such an action against Power while the alleged trust fund was so on deposit, it cannot maintain this action now, after the trust fund has been distributed in payment of the debts of the plow company.

Judgment affirmed.

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GEORGE VOSBECK v. H. M. KELLOGG and Others.

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November 28, 1899.

Nos. 11,846—(106).

Negligence—Independent Contractor.

Held, the evidence is conclusive that, as to the particular complained of, the person in charge of the work was an independent contractor, for whose negligence the respondent is not liable.

Erection of Telephone Line—Power of Company to Contract against Negligence.

A telephone company was licensed by ordinance to erect telephone poles and wires in the streets and alleys of the city, and made a contract with K. by which he agreed to do the work. A child of 5 years of age was injured by voluntarily grabbing with its hands a rope which was being drawn through a pulley when stringing the wire on the poles. *Held*, the negligence in this case was not in obstructing the street, but in failing to keep the child away from the rope; and the duty owing by the telephone company was not one from which, as between it and the public, the telephone company could not relieve itself by contracting with another to do the work.

New Trial—Newly-Discovered Evidence.

Rule applied that an order refusing a motion for a new trial on the ground of newly-discovered evidence will not be reversed where such evidence is merely cumulative, or where sufficient diligence is not shown, or sufficient cause for failing to discover the evidence before the last trial.

Action in the district court for Blue Earth county against H. M. Kellogg, the Mankato Citizens Telephone Company, and the city of Mankato to recover $15,000 for personal injuries sustained by plaintiff's minor child. The issues between plaintiff and defendants Kellogg and the telephone company were tried before Severance, J., who directed a verdict in favor of defendant company. The jury rendered a verdict in favor of plaintiff and against defendant Kellogg for $3,500. From an order denying a motion for a new trial, as against the company, plaintiff appealed. Affirmed.

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J. O. Andrews and *H. L. Schmitt*, for appellant.

The contract did not create the relation of independent contractor between the company and Kellogg. He was merely the agent or servant of the company. City of St. Paul v. Seitz, 3 Minn. 205 (297); Rait v. New England F. & C. Co., 66 Minn. 76; Gahagan v. Aermotor Co., 67 Minn. 252; Singer Mnfg. Co. v. Rahn, 132 U. S. 518; Huff v. Ford, 126 Mass. 24; Water Co. v. Ware, 16 Wall. 566; Linnehan v. Rollins, 137 Mass. 123; Inhabitants v. Boston, 23 Pick. 24; 5 Thompson, Corp. § 6278. Under the evidence it was for the jury to say whether Kellogg was an independent contractor. Gahagan v. Aermotor Co., supra.

Under the franchise, the company owed a personal and direct duty to the city and the public so to use the privileges granted as not to endanger the person or property of any person rightfully on the streets or alleys, and this duty the company could not shift by contract with an independent contractor. 1 Thompson, Neg. 343; Darmstaetter v. Moynahan, 27 Mich. 188; City v. Reid, 41 Neb. 214; Colgrove v. Smith, 102 Cal. 220; Chicago v. Myers, 168 Ill. 139; McWilliams v. Detroit, 31 Mich. 274; Downey v. Low, 22 App. Div. (N. Y.) 460; West v. St. Louis, 63 Ill. 545; Weber v. Buffalo, 20 App. Div. (N. Y.) 292; Cabot v. Kingman, 166 Mass. 403; Fowler v. Saks, 7 Mackey, 570; Hawver v. Whalen, 14 L. R. A. 828, and notes; Smith v. Milwaukee, 91 Wis. 360; Nichols v. City of Minneapolis, 33 Minn. 430; Engel v. Eureka, 137 N. Y. 100; Spence v. Schultz, 103 Cal. 208; 5 Thompson, Corp. § 6349.

The construction of the telephone line was intrinsically dangerous, and it was at least for the jury to say whether it was not so. 29 Am. & Eng. Enc. 948; Robbins v. Chicago City, 4 Wall. 657, 679; Storrs v. City, 17 N. Y. 104; Railroad v. Morey, 47 Oh. St. 207; Woodman v. Metropolitan, 149 Mass. 335; Hundhausen v. Bond, 36 Wis. 29; Palmer v. City, 5 Neb. 136; Hawver v. Whalen, supra; Water Co. v. Ware, supra; Rowell v. Williams, 29 Iowa, 210; Darmstaetter v. Moynahan, supra; 2 Dillon, Mun. Corp. § 1030; City v. Reid, supra; Village v. Chapman, 127 Ill. 438; City v. Jensen, 35 Neb. 68.

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W. A. Funk, W. N. Plymat and *Lorin Cray*, for respondent.

Kellogg was an independent contractor. Smith v. Milwaukee, 91 Wis. 360; Hughbanks v. Boston, 92 Iowa, 267; Gahagan v. Aermotor Co., 67 Minn. 252; Rait v. New England F. & C. Co., 66 Minn. 76; Weber v. Buffalo, 20 App. Div. (N. Y.) 292; Humpton v. Unterkircher, 97 Iowa, 509; Callan v. Bull, 113 Cal. 593; Emmerson v. Fay, 94 Va. 60; Baumeister v. Markham, 101 Ky. 122; Barg v. Bousfield, 65 Minn. 355; Cary v. City, 60 Ill. App. 341; Burns v. McDonald, 57 Mo. App. 599; Harding v. City, 163 Mass. 14; Negus v. Becker, 143 N. Y. 303; Hawke v. Brown, 28 App. Div. (N. Y.) 37; Cullom v. McKelvey, 26 App. Div. (N. Y.) 46; North Chicago v. Dudgeon, 69 Ill. App. 57; Sanford v. Pawtucket, 19 R. I. 537; Leavitt v. Bangor, 89 Me. 509; Wiese v. Remme, 140 Mo. 289; Kuehn v. City, 92 Wis. 263; McDermott v. McDaneld, 55 Ill. App. 226; O'Connor v. Schnepel, 12 Misc. (N. Y.) 356; Wadsworth v. Foster, 50 Ill. App. 513; Conway v. Furst, 57 N. J. L. 645; 1 Harris, Dam. Corp. § 259; Pack v. Mayor, 8 N. Y. 222; Kelly v. Mayor, 11 N. Y. 432; City of St. Paul v. Seitz, 3 Minn. 205 (297); Water Co. v. Ware, 16 Wall. 566; Wharton, Neg. (2d Ed.) §§ 181, 182; Tiedeman, Mun. Corp. § 347; Dooley v. Town, 112 Ind. 451; Pioneer v. Hansen, 176 Ill. 100. It was the duty of the court to construe the contract.

A city is not responsible for the negligent acts of its independent contractor, except when the contract of letting contemplates an undertaking intrinsically dangerous, or which has a natural tendency to endanger the public by making the streets and alleys unsafe for travel. A municipality cannot impose on a third party by franchise or license a duty as to the public which it does not itself owe; and it owes no duty to adults or children to have its streets and alleys free from appliances which may cause injury if improperly handled or meddled with. Emerson v. Peteler, 35 Minn. 481. See North Chicago v. Dudgeon, supra; Sanford v. Pawtucket, supra; Pack v. Mayor, supra; Kelly v. Mayor, supra; City of St. Paul v. Seitz, supra; Water Co. v. Ware, supra; Wharton, Neg. (2d Ed.) § 181; Overton v. Freeman, 11 C. B. 867; O'Connor v. Schnepel, supra.

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CANTY, J.[1]

The Mankato Citizens Telephone Company obtained from the city of Mankato a franchise to construct telephone lines in that city, and for that purpose to erect poles in the public streets and alleys, and string wires thereon. During such construction, plaintiff's infant child was injured by having its hands caught in a pulley through which a rope was being drawn. One end of the rope was pulled by a team of horses. The other end was attached to several wires which were being strung on the cross arm at the top of one of the poles. The rope was brought down from the top of that pole to the base of the next pole, where the pulley was attached. The rope was then passed through the pulley, attached to the whiffletree, and the horses pulled in the opposite direction from that in which the wires were being drawn. The rope passed through the pulley, about two and one-half feet from the ground. The child, between four and five years of age, was discovered with its hands caught in this pulley; and it is to be inferred from the circumstances that the child, seeing the moving rope, went up and grabbed it with both hands, and held it until the hands were drawn into the pulley. This part of the line was being constructed through an alley, and the injury occurred near the rear of plaintiff's house, where his children were in the habit of playing.

This action is brought by the father, under G. S. 1894, § 5164, to recover damages from the telephone company, the city, and Kellogg, the contractor, on the ground that the injury was caused by their negligence. On the trial the court ordered a verdict for the telephone company, and plaintiff appeals from an order denying his motion for a new trial.

1. The telephone line was being constructed by the contractor, Kellogg; and appellant's counsel contend that he was not an independent contractor, but that, for the purpose of this action, the telephone company and Kellogg bore to each other the relation of master and servant. By the terms of the contract between them, Kellogg agreed to furnish "all necessary labor, skill, material, apparatus, supplies, and machinery," and to construct and complete the

[1] BUCK, J., absent.

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work, a part of which was to equip the exchange with telephones and a switch board; "said telephones and switch board to be installed, located, and placed as and where directed" by the telephone company. The contract further provides,

"All said work to be performed and material to be furnished under the supervision, and subject to the approval, of said party of the second part [the telephone company], and a competent person to be selected by said party of the second part."

The company appointed one Willard to look after the work of construction on its part. What he did in the matter of supervising the work is summed up in his own testimony as follows:

"I was to watch and see that the holes were dug the proper depth, and that all poles were set straight and plumb, and to see that all poles were sound and well tamped, and that the cross arms were straight on the poles, and to see that all joints of the wires were all soldered, and such things as that."

He testified that he did all of these things in supervising the work, and there is no evidence to show that he interfered in the work, or took part in the management of it, to any greater extent, or in any other respect.

If Kellogg represented the will of the telephone company only as to the result of the work, and not as to the means by which that result was accomplished, he was an independent contractor. Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45. Whether or not Kellogg was an independent contractor, as regards the means to be employed in stringing the wires, depends on whether or not the telephone company had, under the contract, a right to control the actions of Kellogg as to such means. Gahagan v. Aermotor Co., 67 Minn. 252, 69 N. W. 914; Rait v. New England F. & C. Co., 66 Minn. 76, 68 N. W. 729.

In our opinion, the contract should not be construed as giving the telephone company the right to control the action of Kellogg in the particular here in question. What the contract means is that the telephone company should have the right to supervise as to results, —not merely as to the final result obtained when the work is completed, but also as to the intermediate results obtained from time

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to time as the work progressed. It was not intended by the contract to give the telephone company the right to dictate the means by which these intermediate results should be obtained. The telephone company had no right to say whether the pulley should be attached two feet higher or two feet lower than it was attached, or to say that the horses should pull in the direction the wires were being drawn, or in the opposite direction, or that the pulley should be adjusted accordingly. Then we are of the opinion that, as to the given particular complained of, Kellogg was an independent contractor. For similar cases, see Hughes v. Railway, 39 Oh. St. 461; Smith v. Milwaukee, 91 Wis. 360, 64 N. W. 1041; Humpton v. Unterkircher, 97 Iowa, 509, 66 N. W. 776; Fitzpatrick v. Chicago, 31 Ill. App. 649; Cary v. City, 60 Ill. App. 341.

If, on the evidence, it is doubtful whether the person in charge of the work is an independent contractor, the question is one for the jury; but, in our opinion, a finding in this case that the telephone company had a right to control the means by which the wire should be stretched could not be sustained.

2. The city ordinance which licensed the telephone company to construct the telephone lines provided that

"All poles and lines erected in the streets, alleys or public grounds of said city shall be erected as approved by the common council of said city and under the direction of the committee on streets, alleys and grades and of said common council."

It was further provided,

"Said poles and wires shall be placed and maintained so as not to interfere with public travel or any public improvement on said highways or in said city, and said company shall hold said city free and harmless from all damages arising by reason of any abuse or negligence in said occupancy. * * * And this grant is made and is to be enjoyed subject to all such reasonable regulations and ordinances of a police nature, governing this and like companies within said city, as said common council may be authorized or see proper at any time to adopt, not destructive of the right herein granted."

Appellant contends that under this ordinance the telephone company was bound to protect the public from the danger incident to

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the construction of this line, and could not relieve itself of that liability by contracting with another to do the work. With regard to obstructions in the street which make it dangerous to the traveling public, it may be conceded that the telephone company cannot relieve itself from liability by so contracting with another; and whether such liability arises under this ordinance, or under the general principles of law, we need not now consider. But, in our opinion, this is not such a case. It is not a case of negligently obstructing the street, but of negligently failing to keep a child of tender years and want of discretion from voluntarily interfering with one of the appliances used in doing the work; and the case does not come within that rule. Neither is it, as regards the particular complained of, a case of contracting with another to do work intrinsically dangerous. True, the ordinance provides that the telephone company shall hold the city free and harmless from all damages, and, if the city were compelled to pay such damages, it might have a cause of action against the telephone company; but no such case is before us.

3. The court did not err in refusing to grant the motion for a new trial on the ground of newly-discovered evidence. Such newly-discovered evidence was merely cumulative, and no sufficient diligence is shown, or reason why it was not discovered before the last trial.

Order affirmed.

FREDERICK WOMMER v. MAX M. SEGELBAUM.

November 28, 1899.

Nos. 11,917—(83).

Verdict not Sustained by Evidence.

Held, the verdict is so manifestly and palpably against the great weight of the evidence, and the uncorroborated oral evidence of the prevailing party is so completely contradicted by all the surrounding facts and circumstances, and is so unreasonable, that the court below abused its discretion in refusing a new trial.

Books of Account—Testimony of Witness at Former Trial.

On a former trial of the action two of the account books were missing,

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and could not be found, but were produced on the last trial. Plaintiff was asked on cross-examination if he did not testify on such former trial that these two books contained certain entries. The books were produced to him, and he was also asked if they did contain the entries. *Held*, it was error to refuse to require him to answer the questions.

Action in the district court for Le Sueur county to recover $1,435.55 alleged to be due plaintiff under a contract entitling him to a share in the profits of defendant's business. The case was tried before Cadwell, J., and a jury, which rendered a verdict in favor of plaintiff for $939.85; and from an order denying a motion for a new trial, defendant appealed. Reversed.

Thos. Hessian, for appellant.
W. C. Odell, for respondent.

CANTY, J.[1]

Plaintiff was employed in defendant's general store at Le Sueur, Minnesota, during the time from April 1, 1892, to August 31, 1896. He received, during that time, wages at the rate of $75 per month, which were paid to him at the end of every week. But he claims that by the agreement between them he was to receive as additional compensation 10 per cent. of the profits of the business during all of this time, and this action was brought to recover the same. On the trial, plaintiff had a verdict, and from an order denying a new trial defendant appeals.

Plaintiff testified that the agreement between him and defendant was made orally, about 10 o'clock one night, in defendant's bedroom at Le Sueur. No one else was present except himself and defendant, who admits that he agreed to pay plaintiff $75 per month, but denies that he ever agreed to pay him any more. Plaintiff's oral evidence as to the agreement to pay him the 10 per cent. of the profits is wholly uncorroborated by any other fact or circumstance in the case, is contradicted by a large number of admitted facts and circumstances occurring during the whole course of his employment, and, in our opinion, is so unreasonable and improbable, and the verdict is so much against the great and overwhelming

[1] BUCK, J., absent.

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weight of the evidence, that the court below abused its discretion in denying a new trial.

During these four years and five months plaintiff kept defendant's books, and made nearly all the entries therein. But there is not a suggestion or an entry anywhere in the books to show that plaintiff had a particle of interest in the profits, or that it was necessary that the true and correct amount of the profits should be carried out in the books. Defendant had borrowed from his wife $6,308.10 and from his son $617.23, all of which was used in the business. Plaintiff, in carrying out the profits every year, never allowed the interest on these sums, which sums were also carried on the books to the credit of the lenders. Defendant occupied two adjoining stores, one of which he owned. But in carrying out the profits neither rent for defendant's own store (except for the year 1892) or the taxes on that store were taken into consideration, but the taxes were charged up against defendant in his personal account. After taking stock on January 1, 1893, the profit, ascertained on the basis aforesaid, was carried to the credit of defendant, the proprietor, in the following form: "January 21. By profit during the year, $3,288.31." In the same manner the profit for each of the following years was carried to the credit of the proprietor.

Plaintiff testified on the trial: "I did carry all this profit to the account of M. M. Segelbaum. It so appeared in the books all the time." On April 8, 1892, plaintiff charged himself on the books with the sum of $121.82, which he had taken out at various times prior to that date On November 28, 1892, he paid back $21.82 of this amount, and from that time until he was discharged, on August 31, 1896, the other $100 were carried year after year as a balance due from him He claims that the $100 was an advance made to him in anticipation of future profits, and testified that he paid back the $21.82 because he did not care to carry the money around in his pocket; he did not need it. Defendant testified that the money so advanced was a loan It will be observed that during all of this time plaintiff was carrying this item of $100 and his alleged share of the profits on the books as an asset of the business, and as the property of defendant. Plaintiff's explanation of why he did not draw out his share of the profits during these four years is that

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he did not need the money. He further testified: "I drew out a portion of my share of profits for 1892. Did not draw out all because, in the first place, I did not need it. At the same time Mr. Segelbaum asked me to leave it in the business." But he had a family to support, and admitted on cross-examination that during all, or nearly all, of said time there were from one to three chattel mortgages on his household goods, including the bed on which he slept. Plaintiff testified that when stock was taken on the first of the year 1893 he spoke about his share of the profits. The witness testified:

"I told him [Segelbaum], 'I credit that amount to my account.' He said: 'Mr. Wommer, I rather have you not do that. I don't want the clerks to see what you are getting; and another thing, you know I want to sell out, and I want to make just as good a showing as possible. Besides, you don't need your money. You just as well leave it any way, and, when we settle up, you and I know what is coming to you.' I left it in that way. I had confidence in him."

But plaintiff does not claim that he ever spoke to defendant afterwards about the entry or division of profits until defendant was discharged, on August 31, 1896. On the 9th of that month defendant informed plaintiff that, unless he worked for smaller wages, he could not continue in defendant's employment, and to look for another place. He continued in defendant's employment until August 31, when he took $175 out of the safe, and charged it to himself on the books. On discovering that fact on the same day, defendant discharged him. At this time plaintiff claimed a share of the profits, and defendant testified it was the first time he had ever heard of any such claim.

These are the main features of the case, and we cannot take the time to go more into detail. Plaintiff offered many explanations which do not explain. The undisputed facts and circumstances in the case stand out so strongly against him, and contradict him so completely, that his uncorroborated and unreasonable story has very little weight. The verdict is so manifestly and palpably against the great weight of the evidence that it was an abuse of discretion to refuse to set it aside.

On the trial it appeared that two of the books so kept by plaintiff

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were missing on a former trial, and could not be found. These books were produced on the last trial, and on cross-examination plaintiff was asked if he did not, on the former trial, testify that his share of the profits was plainly marked and apportioned in these two books. Objection to this was sustained. The books were produced to the witness, and he was also asked if there was any such mark or entry in them. Objection to this was also sustained. In our opinion, these rulings were erroneous. If the witness had so testified on the former trial, and the testimony was false, it had a tendency to discredit him on the last trial, and he should have been required to answer both questions.

The order appealed from is reversed, and a new trial granted.

CITY OF FERGUS FALLS v. HALDOR E. BOEN.

November 29, 1899.

Nos. 11,448—(3).

Municipal Corporation—Property in Sewers.

Sewers are the property of the city in which they are built, and may be protected and controlled as any other property of the municipality. No private person has the power to interfere with them.

Construction of Sewer Without Local Assessment—Cost of Connection.

The city of Fergus Falls constructed a sewer in one of its streets, which sewer connected with the state hospital for the insane. The state paid one half the cost, and the city paid the other half out of what is known as a "permanent improvement fund," accumulated by taxation, that such improvements might be paid for without waiting for the collection of assessments. The charter provided for an assessment upon abutting property to pay the cost of constructing sewers, but no assessment was made in this instance. The city council then adopted a resolution, in which it was provided that connection might be made with the sewer by the payment of $33 for each house. The defendant indirectly connected with the sewer, but refused to pay. He made no effort to compel the council to assess for the cost of construction as provided for in the charter. *Held*, that when he connected his house with the sewer he waived the irregular action of the council, accepted the terms and conditions im-

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posed by the resolution, and by implication promised to pay the amount fixed therein.

Action in the district court for Otter Tail county to recover $33 alleged to be due by reason of defendant having connected his premises with plaintiff's sewer. The case was tried before Baxter, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

Chauncey L. Baxter and *C. L. Hilton*, for appellant.

The power of a city to construct sewers is a specific grant for private purposes. The sewers are the private property of the city. City v. Corey, 9 Mich. 164; Child v. City, 86 Mass. 41; Munger v. City of St. Paul, 57 Minn. 9. The city has a right to fix a reasonable charge. Borough v. Young, 53 Pa. St. 280; Hermann v. State, 54 Oh. St. 506.

Parsons & Brown, for respondent.

The charter remedy is exclusive. 2 Dillon, Mun. Corp. §§ 815–817; City of Faribault v. Misener, 20 Minn. 347, 354 (396); Allen v. Walsh, 25 Minn. 543. The resolution was without legislative authority. It was in contravention of Const. art. 9, § 1. The method prescribed by the constitution for collection of the cost of local improvements must be strictly followed, and the provisions of the charter based thereon are mandatory. 1 Dillon, Mun. Corp. § 98. The resolution provided for unequal taxation. 2 Dillon, Mun. Corp. § 752; City v. Shaw, 1 Metc. (Mass.) 130.

COLLINS, J.

Upon findings of fact the court below ordered judgment in favor of defendant, and the appeal is from an order denying a new trial, the claim being that, on the facts as found, judgment should have been for plaintiff.

These facts are not at all complicated. The defendant city constructed a sewer in one of its streets, which sewer connected with the state hospital for the insane. One half the cost was paid by the state, and the other half by the city, out of what is known as the "permanent improvement fund." The city charter provided for an assessment of the cost of sewer construction in the city upon or

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against abutting property, but in this instance no assessment was ever attempted or made. The city council then adopted and passed a resolution in which it was provided that premises adjoining or on the line of the sewer might be connected therewith by payment into the city treasury of the sum of $33 for each house connection. The defendant owned a lot on the line of the sewer, with a frontage of 50 feet, and the court found that the sum of $33 was a reasonable charge against defendant for the privilege of connecting his premises with the sewer. Through an arrangement with an accommodating neighbor, who had made the connection, defendant indirectly connected his own premises with the sewer, and this action was brought to recover the amount fixed in the resolution.

It is true that under the charter the cost of constructing the sewer should have been collected by an equal assessment of an equal sum per front foot on or against the property fronting on the street, including defendant's lot. The cost was advanced out of the permanent improvement fund, as authorized by the charter, and no steps have been taken to restore the amount taken from this fund, as might have been done, by frontage assessment. But it does not follow that defendant may, for this reason, disregard the resolution, and arbitrarily connect his premises with the sewer, built by the city out of moneys previously collected, and set apart as a fund out of which to pay for permanent improvements, without waiting for the collection of assessments upon benefited property. The power of a city to construct sewers is not given for governmental purposes, but is a specific grant, to be exercised for the general welfare of the municipality. Sewers are the property of the city in which they are built, and may be protected and controlled as any other property of the municipality. No private person has the power to interfere with them, for, if such person is unjustly and unreasonably deprived of privileges in connection with the use of such property which are granted to others, or which are his of right, he can speedily obtain redress in the proper tribunals. But he cannot be allowed to take the matter in his own hands, and to disregard rules and regulations concerning such property which have been established and promulgated by authorities, although they may be unauthorized, and not exactly in accordance with the charter provisions.

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If it was the duty of the council of the city in question to proceed to collect the cost of construction by an assessment upon abutting property, and if there was a neglect of duty in this respect, the defendant, as a taxpayer, or as a frontage property owner, could have compelled the performance of the duty. He could have easily obtained an assessment to cover the cost and to reimburse the city, —exactly what he now insists is the only manner in which the cost can be collected. But this he has not done. Proceeding in his own way, and in defiance of the resolution, he has connected his premises with the sewer, and now refuses to pay the sum fixed as a condition for making this connection. His position is that, because the council proceeded improperly and irregularly by prescribing terms upon which the sewer could be used by the abutting property owners, instead of making an assessment under the charter, he may also proceed improperly and irregularly to connect his premises with it. He had no more right to do this than he would have had to tap a water main or to connect with an electric light plant belonging to the city, simply because the authorities had proceeded in an improper manner when prescribing terms and conditions for using water from the main or current from the electric plant. And when the defendant proceeded to make the connection in question, and to avail himself of the sewer privileges, he waived the irregularity of the action of the council, accepted the terms and conditions imposed by the resolution, and by implication promised to pay the amount fixed therein. This sum the city can recover in a civil action.

The conclusions of law of the court below are vacated and set aside, and on the facts as found judgment will be entered against defendant as demanded in the complaint.

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ATHOL MORTON MILLER v. RICHARD M. SELLWOOD.

November 29, 1899.

Nos. 11,731—(47).

Sale—Mutual Mistake—Verdict Sustained by Evidence.

In an action brought to recover a balance claimed to be due from defendant to plaintiff on account of a sale of personal property on the ground of a mutual mistake of fact when computing the total amount to be paid for such property, it is *held* that on the evidence the court was warranted in directing a verdict in plaintiff's favor for the full amount claimed.

Action in the district court for St. Louis county to recover $734.86 and interest on the ground of mutual mistake. The case was tried before Moer, J., who directed a verdict in favor of plaintiff for $772.43; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Davis, Hollister & Hicks and *Henry J. Grannis*, for appellant.
Walter Ayers, for respondent.

COLLINS, J.

There is very little, if any, dispute over the facts in this case. The Sutphin Company, engaged in selling meats at Duluth, wished to sell its stock and fixtures. The plaintiff was interested with Mr. Sutphin and others in the company. The defendant thought of purchasing, and told plaintiff to prepare an inventory of the articles to be sold, with prices attached. He also proposed to have, and Mr. Sutphin did, become connected with the new concern. An inventory was furnished, consisting of several sheets of paper, and the heading and first item on one of these sheets appeared as follows:

Pieces.	Article.	Weight.	Price.	Amount.
738	Lambs.	50,324	4¾	$1,635.53

The parties met on several occasions for the purpose of discussing the terms and conditions of sale, but in respect to the inventory

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prices of the meats the defendant, claiming that he knew very little about such articles, relied upon Mr. Sutphin's experience and knowledge. There were some articles inventoried which defendant declined to consider, and these were stricken off. The prices on some other articles, not herein involved, were not satisfactory, and changes were made, but finally an agreement was reached, and the inventory returned to the bookkeeper of the company that a new one might be made out, in which nothing but the articles which defendant had concluded to buy should appear, the intention evidently being to duplicate the original except as to such articles as were not to be taken by defendant. A new inventory, covering a number of sheets of paper, was then handed to defendant, footings were made on each, the total amount of the various items ascertained, and from the total defendant demanded, and plaintiff assented to, a discount of about 10 per cent. Payment was made, and defendant took possession of the stock and fixtures mentioned in the newly-made inventory. It was subsequently discovered that the item before mentioned thus appeared in that paper:

Pieces.	Article	Weight.	Price.	Amount.
738	Lambs.	50,224	4—	$1,635.53

The inventories corresponded as to number and total value or amount, but in the new the weight was stated at 100 pounds less than in the old, while the price per pound appeared at 4— instead of 4^3, as it did in the old; and an error had been made in the total value in both. It was shown that the figures 4^3 meant $4\frac{3}{4}$ cents per pound, and at this price 50,324 pounds would amount to $2,390.39, or $754.86 more than the sum stated. If the price per pound was 4 cents, and the number of pounds were 50,224, as set out in the new inventory, the total would amount to $2,008.96, or $373.43 more than the sum stated. Evidently there was one mistake, at least, in each inventory. Plaintiff, as assignee of the demand, instituted this action to recover of defendant on the ground of mutual mistake of fact, claiming that the total weight of the lambs was 50,324 pounds, and that the price agreed upon was $4\frac{3}{4}$ cents per pound; and at the

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close of the trial the court ordered a verdict in plaintiff's favor for the full amount claimed, less $25, deducted on account of another mistake in the totals of another item.

The important question here is whether, on the evidence, the court was warranted in its order. We are of the opinion that it was. No one claims that the inventories were not erroneous, and it is agreed that the total weight was 50,324 pounds, as set forth in the first. That the price therein stated was 4¾ cents per pound is undoubted, and from the evidence it is beyond dispute that the negotiations as to the prices to be paid per pound for dressed meats and live animals were made and concluded upon the first inventory. Mr. Sutphin was really defendant's agent in respect to the number, or weight, and quality, and prices to be paid for all meats and animals, and his testimony was clear that 4¾ cents per pound was to be paid for the lambs. The statement of defendant, while testifying, that he never "agreed" to pay that price, is not borne out by the plain and unmistakable facts, which indicate conclusively that the agreement was to pay at the rate of 4¾ cents per pound. If this was not the agreement none whatever was entered into between the parties. The proofs were conclusive that plaintiff agreed to sell and defendant agreed to buy 738 lambs with a total weight of 50,324 pounds at 4¾ cents per pound. That an error had been made in the computation, that this error was carried into the second inventory, and another made, and that defendant obtained a discount on the ground of custom in the trade, does not affect the very evident fact that a mutual mistake was made, which it is the business and the duty of the courts to rectify upon discovery.

Order affirmed.

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LLOYD BARBER v. THOMAS ROBINSON.

November 29, 1899.

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Nos. 11,750—(72).

Ejectment against Stranger to the Title—Proof of Good Faith.

In an action to recover possession of real property, between a plaintiff who obtains his title directly from the grantee in a deed first of record, but executed subsequently to one from the same grantor to another grantee, and who can make prima facie title without recourse to the deed last mentioned, and a defendant who is a stranger to the title, and does not claim under the senior grantee, it is not incumbent on the plaintiff to show that the junior grantee was a purchaser in good faith and for a valuable consideration, or to show himself to be such a purchaser. The burden of proof is on him who seeks to destroy the prima facie title.

Adverse Possession of Part of Tract.

One who without color of title enters upon a tract of unoccupied real property, and takes visible, open, and notorious possession of a part thereof, cannot extend his possession so as to embrace the whole tract, merely by obtaining color of title thereto subsequent to his entry.

Finding not Sustained by Evidence.

Held, that a finding of fact, to the effect that defendant and his predecessors had been in adverse possession of all of the land described in the complaint herein for more than 15 years immediately prior to the commencement of this action, is not sustained by the evidence.

Action of ejectment in the district court for Winona county. From a judgment in favor of defendant, entered pursuant to the findings of Snow, J., plaintiff appealed. Reversed.

Brown & Abbott and *Lloyd Barber*, for appellant.

Plaintiff had a right to rely on the first recorded deed, and was not required to examine the record further for another deed from the same grantor. Babcock v. Collins, 60 Minn. 73, 81; Shotwell v. Harrison, 22 Mich. 409, 420; O'Neal v. Boone, 82 Ill. 589, 604; Morse v. Curtis, 140 Mass. 112, 114. In a collateral proceeding the recital in the deed of consideration was prima facie evidence of its payment. Jackson v. M'Chesney, 7 Cow. 360; Page v. Waring, 76 N. Y. 463; Todd v. Eighmie, 4 App. Div. (N. Y.) 9; Shotwell v. Harrison,

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supra; Reynolds v. Vilas, 8 Wis. 227; Lampe v. Kennedy, 56 Wis. 249, 252. Defendant, having attacked plaintiff's title, must produce sufficient evidence to show that the deed to Chambers was void. Lampe v. Kennedy, supra; Bank of Farmington v. Ellis, 30 Minn. 270, 272; Shay v. Security Bank, 67 Minn. 287, 290; Wright v. Larson, 51 Minn. 321, 323; Hogan v. Atlantic E. Co., 66 Minn. 344, 348; Ryder v. Rush, 102 Ill. 338, 340; Anthony v. Wheeler, 130 Ill. 128; Hendrickson v. Woolley, 39 N. J. Eq. 307; Sheffey v. Bank of Lewisburg, 33 Fed. 315, 319; Parrish v. Mahany, 10 S. D. 276; Rigney v. Plaster, 88 Fed. 686, 690; Carson v. Bunker, 83 Iowa, 751.

Nevill's adverse possession could only be co-extensive with his occupancy. Coleman v. Northern P. R. Co., 36 Minn. 525; Sage v. Larson, 69 Minn. 122, 123. To enable defendant to hold more than was first inclosed by reason of Nevill having subsequently obtained color of title to lot 24 and the 80-acre tract, defendant must prove acts by some one equivalent to a new taking more than 15 years before this action. Pepper v. O'Dowd, 39 Wis. 538, 548; Furlong v. Garrett, 44 Wis. 111, 119. There was no privity between defendant and his predecessors with Nevill as to lot 24, and defendant can claim nothing from Nevill's occupation. Sherin v. Brackett, 36 Minn. 152; Witt v. St. Paul & N. P. Ry. Co., 38 Minn. 122, 129.

D. E. Vance and *Webber & Lees*, for respondent.

As against one claiming under a prior unrecorded deed, the burden rested on plaintiff to show good faith and payment of a valuable consideration. Roussain v. Patten, 46 Minn. 308; Mead v. Randall, 68 Minn. 233; Fritz v. Ramspott, 76 Minn. 489; Palmer v. Yorks, 77 Minn. 20. On principle the rule should apply in a case like this, though defendant does not claim under the prior unrecorded deed. Plaintiff must recover on the strength of his own title. A valid outstanding title in a third person superior to that of plaintiff defeats his right to recover, even though defendant cannot connect his title and possession with that of such third person. Newell, Eject. 652; 10 Am. & Eng. Enc. (2d Ed.) 481; Henderson v. Wanamaker, 49 U. S. App. 174; 2 Pomeroy, Eq. Jur. § 760. Recital of consideration is not evidence in plaintiff's favor. 2 Jones, Ev. § 476; Rose v. City, 119 Mass. 99. "Good faith" means

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absence of notice. Martin v. Brown, 4 Minn. 201 (282); Minor v. Willoughby & Powers, 3 Minn. 154 (225); Hersey v. Lambert, 50 Minn. 373. Delivery of a deed is presumed to be on its date. 1 Devlin, Deeds, §§ 178, 265.

Entry under color of title and subsequent occupancy of part under claim of title to the whole raises a presumption that the occupant claims all to which he has color of title. Murphy v. Doyle, 37 Minn. 113; Miesen v. Canfield, 64 Minn. 513. The same rule should apply where entry under color of title is followed by conveyance to the claimant of land which includes that actually entered upon, when the land is a single tract of size to be managed and used in one body according to the custom of the country. The claimant has the right to strengthen his adverse claim by obtaining color of title and defining the boundaries of his claim. Dean v. Goddard, 55 Minn. 290, 296. It is immaterial whether Nevill's tax title was valid. Murphy v. Doyle, supra; Miesen v. Canfield, supra; Ricker v. Butler, 45 Minn. 545; 1 Am. & Eng. Enc. (2d Ed.) 852. If land is used for the statutory period in the manner in which it is customary to use similar land, it is sufficient. Swan v. Munch, 65 Minn. 500; Murphy v. Doyle, supra; Dean v. Goddard, supra; Costello v. Edson, 44 Minn. 135; Backus v. Burke, 63 Minn. 272, 279; Wood v. Springer, 45 Minn. 299; Webb v. Richardson, 42 Vt. 465, 473.

COLLINS, J.

Action of ejectment. Plaintiff asserted title in fee in his complaint, and relied upon the patent title at the trial. Defendant by his answer put plaintiff upon his proof of title, and also alleged actual, visible, notorious, and uninterrupted possession of the premises in himself and his predecessors under claim of title for more than 15 years prior to the commencement of the action. The case was tried by the court without a jury, and upon the facts as found judgment was ordered for defendant.

The land in dispute comprises outlot 24, in the town site of Richmond, Winona county, and a government 80 adjoining the lot on the west, in all about 100 acres of wild and uncultivated land, partly covered with trees, and more suitable for pasturage than for tillage.

The first question is, did plaintiff show sufficient paper title to

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enable him to recover possession in an action of ejectment? His claim was based upon a warranty deed duly recorded, but which was executed subsequently to another warranty deed from the same grantor, but not on record when the first-mentioned deed was recorded. The earlier deed was of record when the junior grantee deeded directly to plaintiff. And plaintiff made no attempt to show, except by the introduction of the record of the subsequently executed deed under which he claimed title, that the grantee therein named was a purchaser of the land in good faith or for a valuable consideration.

It is settled in this jurisdiction that, as between plaintiff and a party claiming title under the earlier deed in point of time of execution and delivery, but with the latter record, the burden would be upon plaintiff to show, by extrinsic evidence, both good faith on the part of the grantee named in the later deed or on his own part, and the payment of a valuable consideration. If this doctrine is applicable in an action of ejectment, when the defendant in possession is a stranger to the title complicated by the recording of two deeds from the same grantor, the last in the matter of execution and delivery being the first to be recorded, the plaintiff failed in his proof, and the court committed no error when ordering judgment for defendant.

The recording act (G. S. 1894, § 4180) provides that every conveyance of real estate, by deed, mortgage, or otherwise, shall be recorded in the office of the register of deeds for the proper county, and if not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof. It is the proper construction of this statute which casts upon a junior grantee the burden of proving, as against a senior grantee with an unrecorded deed, or a subsequently recorded deed, that he is a good-faith purchaser for a valuable consideration. There is no intimation in the statute that, as against a stranger to his title, the grantee in the deed last to be executed and delivered is obliged to show his good faith, or that he paid a valuable consideration. In fact, the operation of the act is in terms confined to those who have first obtained deeds of conveyance, but have failed to comply with the recording act, to the

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actual injury of good-faith purchasers for a valuable consideration. Such is not this case.

The plaintiff herein established by the record a prima facie title to the premises, and this was sufficient to show his right to recover possession. The burden of proof was then upon defendant to overthrow the prima facie legal title shown to be in the plaintiff. In a contest like this, for the possession of real property, between one who obtains his deed direct from a junior grantee and can make a prima facie title to the premises without recourse to the older deed, and one who is a stranger to that title, and does not claim under the senior grantee, the onus is upon him who seeks to destroy such title. Lampe v. Kennedy, 56 Wis. 249, 14 N. E. 43. See also Mead v. Randall, 68 Minn. 233, 17 N. W. 31. A careful reading of Henderson v. Wanamaker, 49 U. S. App. 174, 25 C. C. A. 181, will demonstrate that it is not in opposition to what is stated above. This rule in no manner infringes upon that other proposition, relied upon by defendant's counsel, that a plaintiff in ejectment must depend upon the strength of his own title rather than upon the weakness of that of his adversary; for plaintiff's title, as shown by the record, was good as against the whole world, except that when attempting to establish it as to one whose rights were based upon an earlier, but subsequently recorded, deed, the recording act, as construed by the courts, compelled the junior grantee to assume the burden of showing that he was a good-faith purchaser and for a valuable consideration. Therefore proof of the existence and record of the earlier deed, and of the record of the lis pendens, when plaintiff bought, was insufficient to overthrow the prima facie legal title established by him, and the trial court was in error when so holding.

This brings us to the finding of fact as to defendant's adverse possession. The court found, from the various facts and circumstances which had previously been detailed in the findings, that defendant and his predecessors in interest had been in open, visible, notorious, continuous, exclusive, and hostile possession of both tracts of land, and all thereof, for more than 15 years immediately prior to the commencement of the action under claim and assertion of right so to do, and the finding is attacked by the assignments of error.

From the testimony it appeared that a man named Nevill lived on

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a town lot a few rods east of outlot 24, in the spring of 1881. He then took possession of a tract of land to which he had no color or claim of title, lying west of his dwelling, by causing a fence to be built inclosing the same. It is this act upon which defendant relies as the foundation of his claim of title by adverse possession. The man who built this fence was called as a witness at the trial, and testified as to where it was, and the distances on each side, as near as he could remember. If his recollection as to distances is to control, it would seem that the inclosure was all on lot 24, but he was also of the opinion that there were at least 40 acres fenced in. If the tract enclosed exceeded 20 acres, a part of the 80 must have been included. There was other testimony tending to show that there were 40 acres within the fence, and, taken all together, the proof was sufficient to warrant a finding that the inclosure was in part upon lot 24, and in part upon the 80-acre tract, and that it embraced at least 40 acres. The court found that the greater part of the lot and the northerly 45 acres of the 80 were inclosed, and one of the assignments of error reaches this finding. But, for reasons which will hereinafter appear, it is not essential for us to express an opinion as to the sufficiency of the evidence to support this finding as a whole.

As before stated, Nevill was nothing but a naked trespasser when he built this fence. He acquired no color of title to either tract of land until several months afterwards. He then obtained a tax title, or deed, to a larger body of land, which included the lot, and a quitclaim deed to the 80 from another person, who had previously secured a tax title or deed thereof. The court found that Nevill received these deeds as valid conveyances of the land, and thereafter claimed title to each tract in good faith, but, also, that no legal or valid title to either piece of land was in fact vested in him by virtue of these deeds. Nevill thereafter continued to use and occupy the land inclosed, for the purpose of pasturing his stock, until he sold and conveyed both pieces,—the 80 in 1885, and lot 24 in 1887. He also cut wood upon the 80, outside of the inclosure, in 1882 and 1883. At some time, just when was not shown, but after Nevill had parted with his claim to the premises, the fence was removed upon two sides, so as to embrace more land within the

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inclosure. It was shown that without interruption the pasture was used by the persons who, from time to time, succeeded to Nevill's rights and interests through deeds of conveyance, up to and including this defendant, whose claim of title and whose possession dates from the spring of 1897. And in succession each of these persons claimed ownership of both tracts, cut wood on the land outside of that inclosed by the fence, and paid taxes from year to year.

We have no doubt but that title by adverse possession was established in defendant as to all of the land which Nevill fenced in the spring of 1881, for he then took actual possession in hostility to the true owner, and this has been maintained and asserted ever since by himself and his successors in interest. But as to the balance of the land the claim that Nevill or his successors have used and occupied it, or have exercised visible and notorious acts of ownership over the same, is not justified by the proof. In fact, the evidence falls far short of sustaining such a claim. To support the finding of fact that for more than 15 years immediately prior to the bringing of this action the defendant and his predecessors in interest have had adverse possession to all of lot 24, and all of the 80-acre tract, and have thereby acquired title to both pieces, we should have to disregard the rule that, when an invader enters upon land, he is deemed to be in possession of nothing of which he is not in the actual occupation, and that subsequent adverse possession thereof is limited to the portion actually occupied, and nothing more. And we then should have to hold that where such an invader, subsequent to his entry and actual occupancy of a part of a tract, obtains color of title to the whole thereof, a presumption is raised that he claims, and must be deemed to be in possession of, the entire tract. We should also have to hold that in some way the act of obtaining color of title related back to the time of the entry, or that such entry could in some manner be brought forward, and connected with the color of title subsequently obtained.

The reason for the doctrine that when a man enters upon land claiming a right and title to the same under color of a conveyance, and acquires a seisin by his entry, his seisin will extend to the whole tract, there being no adverse actual possession in the way, is because an entry on part of the land is deemed to be an entry and an

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ouster as to the whole. The entry and the possession are referred to the claim of title, and are co-extensive with the boundaries stated in the conveyance or other written instrument under which entry has been made. But when an entry is not under color of title there is no invasion or disseisin which notifies the true owner of a claim asserted by another person, or which gives him a right of action, except as to the land actually occupied. As between the owner and the invader, actual occupation of a part divides the possession which has theretofore been constructively in the former, so that as to the occupied land possession is in the latter. The true owner is not subsequently dispossessed and disseised by the obtaining of color of title to the whole tract by the adverse claimant. Possession of the whole cannot be drawn to the occupant of a part in that way. We are of the opinion that the finding in question was wholly unwarranted by the evidence. Reference to other assignments of error need not be made.

Judgment reversed, and a new trial ordered.

AMANDA ENGSTROM v. CITY OF MINNEAPOLIS.

November 29, 1899.

Nos. 11,786—(123).

Municipal Corporation—Notice of Personal Injury—Laws 1897, c. 248.

Bausher v. City of St. Paul, 72 Minn. 539, adhered to as to the necessity of complying with the provisions of Laws 1897, c. 248, as a condition precedent to the right to maintain an action.

Action in the district court for Hennepin county to recover $5,000 damages for personal injuries caused by the negligence of defendant in allowing snow and ice to accumulate on the sidewalk. From an order, Simpson, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

W. S. Dwinnell, for appellant.

Frank Healey and *L. A. Dunn*, for respondent.

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COLLINS, J.

The only question raised by this appeal was disposed of in Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745, in which it was held that Laws 1897, c. 248, requiring notice to cities and villages of an injury for which damages were claimed, is mandatory, and that such notice is a condition precedent to the right to maintain an action to recover such damages. See also Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029. We have no occasion to add to what was said in these cases in support of the conclusion reached. They were properly determined, in our opinion.

Because of some statements of appellant's counsel in his brief, it is well enough to say that we have not held that special charter provisions providing for notice of injuries have been repealed by chapter 248. The question has never been before us, and is not in this case.

Order affirmed.

EDWIN ROLAND ASHTON and Another v. GREAT NORTHERN RAILWAY COMPANY.

November 29, 1899.

Nos. 11,794—(103).

Devise—Particular Estate with Power to Convey Fee.

A. devised all of his real estate, except a part not herein involved, to his wife, during the term of her natural life, and also provided: "I do hereby fully authorize and empower her to sell and dispose of my said estate, or any part thereof, and give good and absolute title thereto by deed or otherwise, whenever in her judgment it is expedient to dispose of the same; and purchasers of said property are not required to look after the application of the proceeds thereof." And, further: "That at the death of my said wife all of my said estate that may remain unsold and undisposed of by her I give, devise, and bequeath to my three children aforesaid, Thomas Ashton, Isaiah Heylin Ashton, and Eliza Burton Ashton, to be divided equally between them, share and share alike." The will was duly probated, and thereafter the grantee of the power, the widow of the devisee, conveyed by deed containing full covenants of warranty and in the usual form a part of the premises to a railway company. In an action of ejectment, brought after the decease of the widow, by the

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heirs at law of a remainder-man against the tenant of the company, it is *held*, that under the provisions of G. S. 1894, §§ 4309, 4312, 4313, 4350, the grantee in the deed acquired a perfect and complete title to the property, and that the plaintiffs have no interest therein.

Action of ejectment in the district court for Ramsey county. The case was tried before Bunn, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

Charles J. Berryhill, for appellants.

Wheeler H. Peckham and *Frederick Allis* also submitted a brief in behalf of Eliza Burton Ashton Allis, a tenant in common with plaintiffs under the same title.

George B. Young and *W. R. Begg*, for respondent.

COLLINS, J.

Action to recover possession of an undivided half of certain lots in the city of St. Paul.

Plaintiffs, as the heirs of a remainder-man, and defendant corporation, as the tenant of another corporation, the St. Paul, Minneapolis & Manitoba Railway Company, claim title through a common source, one Joseph Ashton, who died testate in 1874, seised of the premises, except a portion which he had previously conveyed to the predecessor in interest of the last-mentioned corporation, and as to this portion there was no controversy at the trial. Defendant's right of possession to the balance of the premises is made to rest upon a deed with full covenants of warranty executed and delivered in 1880, in which Mary Jane Ashton, the widow of Joseph, was the grantor, and the railway company the grantee. Mrs. Ashton died in 1897. The sufficiency of this deed to convey title in fee to the grantee named therein depends upon the construction to be placed upon a part of the last will and testament of Mr. Ashton, and upon certain statutory provisions, when read in connection. The clauses in the will to which we have referred are as follows:

"Third. I give, devise, and bequeath to my beloved wife, Mary Jane Ashton, all my estate, real, personal, and mixed, of which I am now or may hereafter become seised, of every name and nature whatsoever, and wherever located, except that above disposed of in item second, during her natural life; and I do hereby fully authorize

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and empower her to sell and dispose of my said estate, or any part thereof, and give good and absolute title thereto by deed or otherwise, whenever in her judgment it is expedient to dispose of the same; and purchasers of said property are not required to look after the application of the proceeds thereof. Fourth. That at the death of my said wife all of my said estate that may remain unsold and undisposed of by her I give, devise, and bequeath to my three children aforesaid, Thomas Ashton, Isaiah Heylin Ashton, and Eliza Burton Ashton, to be divided equally between them, share and share alike."

That part of the testator's estate mentioned in item 2 cuts no figure in this case.

As was said quite recently in Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967, G. S. 1894, c. 44, is a complete and exclusive code on the subject of powers, the pre-existing rules of the common law being of no importance, except as aids, when construing the statutory provisions. By this chapter all powers are abolished, except as therein authorized and empowered. This being the condition of the law on this subject in this state, we are referred to a number of sections of this chapter upon which defendant's counsel plant their case, and insist that the conveyance by warranty deed from Mrs. Ashton to the railroad company vested in the latter a perfect title to the premises. The argument is that, as Mr. Ashton bequeathed and devised to his wife, during her natural life, all of the estate now in dispute, and authorized and empowered her to sell and dispose, and to give good and absolute title, by deed or otherwise, to all or any part thereof, whenever in her judgment it was expedient to dispose of the same; and as he also provided that purchasers were not required to look after the proceeds of a sale; and as he further provided that at her decease all of his estate that might remain unsold and undisposed of by her should descend to his three children, share and share alike,—Mrs. Ashton's estate was, by means of section 4309, changed into a fee absolute in respect to the rights of creditors and purchasers, the railroad company being of the latter class. And that by means of the power of disposition contained in the will, and not accompanied by any trust, her estate became absolute, and she was thus enabled in her lifetime to dispose of the entire fee for her own benefit.

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In the Hershey case, sections 4312 and 4313 were carefully and fully considered with reference to the provisions of the testamentary devise there involved. It would seem clear from the interpretation then placed upon the sections we have referred to, and what was said on the subject, that the power granted by Mr. to Mrs. Ashton, to be exercised when she became his widow, as she deemed expedient, and without any restriction upon the manner of disposition, was a beneficial power, and not a power in trust. These statutory provisions, as construed, seem completely to dispose of the contention of plaintiffs' counsel. See also Deegan v. Wade, 144 N. Y. 573, 39 N. E. 692; Hernhauser v. Decker, 38 N. J. Eq. 426; Yetzer v. Brisse, 190 Pa. St. 346, 42 Atl. 677. But, in any event, the defendant acquired title to the premises through the deed from Mrs. Ashton, which, as before stated, contained full covenants of warranty. It purported to convey an estate in fee simple, not merely a life interest. In terms the conveyance was to the grantee railway company, its successors and assigns, forever. The grantee was to have and to hold the premises to itself, its successors and assigns, forever. It was executed under seal, and the express consideration was $1,900, the payment of which in full was duly acknowledged. And by the terms of the will Mrs. Ashton was authorized and empowered to sell and dispose of "my said estate, or any part thereof," and to give good and absolute title thereto. Her judgment as to the expediency of an absolute sale was to be exercised unfettered and untrammeled, and that she intended to convey the fee cannot be questioned. The deed was a good conveyance under the provisions of section 4350, which is as follows:

"Every instrument executed by the grantee of a power, conveying an estate or creating a charge which such grantee is authorized by the power to convey or create, but which he would have no right to convey or create, unless by virtue of his power, shall be deemed a valid execution of the power, although such power is not recited or referred to therein."

The purpose of this statute is perfectly plain. It was designed to put at rest the question which had arisen at common law as to the necessity of reciting in the instrument executed by the grantee of a power that it was executed in pursuance of such power. The

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deed from Mrs. Ashton was an instrument executed by the grantee of a power conveying to the railway company an estate which she had been authorized to convey, but which she would have had no right to convey unless by virtue of the power. By means of the deed the power was validly executed, although such power was not recited or referred to therein. The deed of conveyance could not have operated according to its terms if it had not been executed under the power. It may be said, in addition, that the testator expressly and industriously provided in the fourth item of his will that only that portion of his estate which should "remain unsold and undisposed of by" his wife at the time of her death was to go to his children. This property in controversy had been sold and disposed of by her, and the children had no interest in it.

The question has not been raised by counsel, nor have we considered the effect of the final decree of the probate court of Ramsey county, in which the will in question was duly presented, proven, and allowed. No other matters need to be discussed.

Order affirmed.

CHARLES F. BYRNES v. CITY OF ST. PAUL.

November 29, 1899.

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Nos. 11,821—(92).

Unlawful Discharge of Police Officer—Compensation.

An appointive municipal officer, like a policeman, unlawfully dismissed and prevented from rendering any service, who has made no complaint to the mayor or to the city council, has not attempted to secure a reinstatement, but who has apparently acquiesced in the dismissal, cannot recover of the municipality the compensation incident to the office during the period in which he has performed no service. He must be deemed to have voluntarily abandoned or relinquished his office, or, as it is sometimes expressed, to have "resigned by implication."

Action in the district court for Ramsey county to recover $3,214.36 alleged to be due to plaintiff as a member of the police force of defendant. The case was tried before Kelly, J., who directed a verdict in favor of plaintiff for $15, being compensation for six days

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ending June 13, 1894. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Thompson & Thompson, for appellant.

The acts of the chief of police could at most have the effect of suspending plaintiff from duty for a reasonable time only, after which he was entitled to compensation till he ceased to make effort to be assigned to duty. Galvin v. St. Paul City, 58 Minn. 475. Under our statute a de jure police officer is entitled to compensation if able and willing to perform his duties; and in the absence of statute the better rule is that one having the legal right to a public office, but not in possession of it, is entitled to the salary; and payment of the salary to one in possession without title will not prevent one having title from recovering. People v. Smyth, 28 Cal. 21; People v. Oulton, 28 Cal. 45, 52; Burke v. Edgar, 67 Cal. 182, 184; People v. Potter, 63 Cal. 127; People v. Tieman, 8 Abb. Pr. 359, 361; State v. Carr, 129 Ind. 44; Fitzsimmons v. City, 102 N. Y. 536; Andrews v. City, 79 Me. 484, 490; Elliott, Mun. Corp. § 269; Tiedeman, Mun. Corp. § 79. The doctrine that a police officer may be entitled to compensation without having rendered services has been recognized in Yorks v. City of St. Paul, 62 Minn. 250; Galvin v. St. Paul City, supra. See Gregory v. Mayor, 113 N. Y. 416.

James E. Markham, for respondent.

A resignation by implication, or a forfeiture of office, occurs where the incumbent by act or omission clearly indicates an attempt to abandon the office, or disqualifies himself from continuing to hold it. Throop, Pub. Off. § 407. If he makes no effort to be reinstated, having it in his power to be reinstated, the inference is inevitable that he has acquiesced in the removal, and abandoned the office, and waived his right to it. Hagan v. City, 126 N. Y. 643. See Phillips v. City, 150 Mass. 491; Bernard v. Mayor, 27 N. J. L. 412; Throop, Pub. Off. § 510; Wood v. Mayor, 55 N. Y. Super. 230; Terhune v. Mayor, 88 N. Y. 247; Riley v. City, 31 Mo. App. 439. Plaintiff's receipt of compensation for seven days in June, 1894, with other circumstances, works an estoppel. Love v. Mayor, 40 N. J. L. 456.

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Under the charter the chief of police had power to suspend plaintiff. No formal order or written direction was essential. Howard v. City, 88 Mo. 656; Westberg v. City, 64 Mo. 493. The suspension continued till revoked or set aside, and plaintiff was not entitled to pay till restored. Wood v. Mayor, supra; Barbour v. U. S., 17 Ct. Claims, 149. The bare holding of office gives no right to receive any amount not fixed by the proper authorities. Throop, Pub. Off. §§ 446, 447; 1 Dillon, Mun. Corp, § 230; Haswell v. Mayor, 81 N. Y. 255; Sikes v. Inhabitants, 13 Gray, 347. See Galvin v. St. Paul City, 58 Minn. 475.

COLLINS, J.

For more than one year prior to June 6, 1894, plaintiff had been a policeman in the city of St. Paul, assigned to duty as a detective, and required to report for service to another police officer, known as "chief of detectives." On that day the chief of police demanded that plaintiff resign from the force, which he refused to do, and continued to report for service as before. June 13 the chief of police met plaintiff at the central station, and, after directing him to turn over his keys and badge (city property) to the desk sergeant, said, "I have no more use for you." In response to the chief's demand, plaintiff immediately delivered the keys and badge to the sergeant. He understood from what was said that the chief intended to discharge him from the service, and omitted to report for duty for a week or 10 days. He then, and frequently thereafter, for about two years, applied to the chief of detectives to be assigned to duty. His applications were refused. He performed no service, and his successor was appointed and served. July 15, 1894, he signed the city pay roll, and received a check for seven days' service, —that being the unpaid time,—and made no claim for anything further. He never took any steps looking toward a reinstatement, never spoke to the chief of police about the matter, never called the attention of the mayor or of the city council to the fact that the chief of police had deprived him of his keys and badge, had refused to allow him to go upon duty, and had attempted summarily to discharge him from the service. He did not assert in any manner that he was still a member of the force. He waited until February 18,

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1898, and then commenced this action, claiming the right to recover salary from June 7, 1894, up to February 15, 1898,—three days before the summons was served.

It stands admitted that the chief of police had no authority, under the charter, to dismiss a policeman. This authority rests with the mayor; but, if the officer has held his position for six months immediately preceding a dismissal, it does not take effect until the common council concurs. The action of the chief, when notifying plaintiff that he had no further use for him, was, when taken alone, of no effect. But plaintiff acquiesced in this irregular and unauthorized act. He not only obeyed the order to surrender his keys and badge, which, in itself, was of no particular consequence (see Galvin v. St. Paul City, 58 Minn. 475, 59 N. W. 1102), but he left the station, did not return for a week or 10 days, and, so far as could be judged from appearances, made no objection to the decision of the chief. He acted as if he intended to abandon the office without remonstrance. Later he reported to the chief of detectives, but this officer had no power to restore him to duty, or, if he had been improperly removed, to reinstate him upon the force. He allowed another person to be appointed to his place, to do the work, and to receive the compensation. He failed to notify the mayor that the chief had attempted to dismiss him from the service. He did not inform the city council that he had been improperly discharged, and without its concurrence, or that the chief had refused to allow him to render an equivalent for his salary.

In short, he made no protest or demand, as he might and should have done if, in good faith, he was of the opinion that he was still a member of the police force, and entitled to his pay. It was his especial duty to seek to be reinstated in his office by formal demand, and, if necessary, by appropriate legal proceedings, in view of the peculiar relation in which he stood to the defendant, of which he now seeks to avail himself. When he did nothing of this kind, when he did not even demand his salary from the city, to permit a claim of this nature to be accumulated against it would be unreasonable. An appointive municipal officer, as was plaintiff, unlawfully dismissed and prevented from rendering any service, who has made no complaint to the mayor or to the city council, has not

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attempted to secure a reinstatement, but who has apparently acquiesced in the dismissal, cannot recover of the municipality the compensation incident to the office during the period in which he has performed no service. Hagan v. City, 126 N. Y. 643, 27 N. E. 265; Phillips v. City, 150 Mass. 491, 23 N. E. 202; Bernard v. Mayor, 27 N. J. L. 412; Throop, Pub. Off. § 407. The plaintiff voluntarily abandoned and relinquished his office, or, as it is sometimes expressed, he "resigned by implication." This disposes of the case.

Order affirmed

ALICE M. SKONE v. JABEZ S. BARNARD.

November 29, 1899.

Nos. 11,824—(118).

New Trial—Hicks v. Stone Followed.

Order appealed from affirmed, following Hicks v. Stone, 13 Minn, 398 (434), and subsequent cases.

Appeal by plaintiff from an order of the district court for Scott county, Cadwell, J., granting a motion for a new trial, unless plaintiff should consent to a reduction of the verdict from $261.49 to $8.49. Affirmed.

G. A. Petri, for appellant.

H. J. Peck and *E. & W. N. Southworth*, for respondent.

BROWN, J.

This is an appeal by plaintiff from an order granting defendant's motion for a new trial. The action is one to recover a balance claimed to be due plaintiff upon a promissory note made and delivered to her by defendant on July 21, 1898. The defendant interposed the defense of payment, claiming at the trial that he had paid upon the note the sum of $245, which had not been credited to him. The only question in issue before the court below, and the only question passed upon by the jury, was whether that amount of money had been paid by defendant to be applied on the note. It was conceded by plaintiff that it was paid to her. She gave a

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receipt therefor. But she insisted that it was so paid upon an indebtedness due her father for a crop of grain by him theretofore sold defendant. Defendant insisted and contended that it was paid upon this note, and had no connection with the crop transaction. The jury found against defendant, and returned a verdict for plaintiff. The court below made an order, on defendant's motion, granting a new trial of the action unless plaintiff should remit from the verdict all in excess of $8.49, which defendant conceded to be due, such excess being the disputed $245. The plaintiff refused to comply with the order, and appealed therefrom. The order is based on the ground that the verdict was not justified by the evidence.

The case comes clearly within the rule of Hicks v. Stone, 13 Minn. 398 (434), and subsequent cases. There is evidence to support the verdict, yet it is not so manifestly and palpably in plaintiff's favor as to justify a reversal of the order. The evidence is conflicting, with circumstances corroborating both parties, and we are not so clear but that the stronger circumstances are with defendant.

Order affirmed.

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ADELE H. PORTER v. WINONA & DAKOTA GRAIN COMPANY and Another.

November 29, 1899.

Nos. 11,832—(164).

Promissory Note of Corporation Payable to Its Officer.

A negotiable promissory note executed in behalf of a corporation by its president, and in which he is named as payee, is prima facie void as to such corporation. The burden is upon the holder of such an instrument to show that it is in fact the obligation of the corporation. Proof that it was made payable to the order of the president at the request of the holder does not tend to establish a corporate obligation.

Acts of Officer not Binding upon Corporation.

Acts of the president with respect to such a note, such as partial payment with the funds of the corporation, do not bind it, as a ratification of the unauthorized execution of the note, or otherwise.

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Failure of Proof.

Held, in the case at bar, that the plaintiff wholly failed to make out a case for recovery on such a note as against the corporation.

Amendment of Complaint.

Held, further, that the court ruled correctly when denying plaintiff's motion for leave to amend the complaint so as to charge the president, who, when delivering the note to plaintiff, had placed his name on the back of the same, as an anomalous indorser, and also that it ruled correctly when dismissing the case as to the payee indorser on the ground of a failure of proof of notice of demand and nonpayment.

Action in the district court for Winona county to recover a balance of $1,800 on a promissory note purporting to be executed by defendant company to the order of defendant W. H. Garlock and by him indorsed. The case was tried before Snow, J., who granted a motion to dismiss the action as against defendant Garlock, and directed a verdict in favor of defendant company. From a judgment entered pursuant to the order of dismissal and the verdict, plaintiff appealed. Affirmed.

O. B. Gould, for appellant.

Webber & Lees and *C. A. Morey*, for respondents.

COLLINS, J.

The note in controversy here was made payable to the order of W. H. Garlock, and signed, "The Winona & Dakota Grain Co., by W. H. Garlock, Pres." It was then indorsed on the back by Garlock, and delivered to plaintiff's agent for her. Garlock was the president of the grain company at the time of the transaction.

1. Plaintiff's counsel raises some question as to whether the execution of the note was denied under oath by the person executing it. G. S. 1894, § 5751. But this is wholly immaterial. The answer of the grain company was good as a pleading, for it put in issue the execution and delivery of the note; and it was held in McCormick Harvesting Machine Co. v. Doucette, 61 Minn. 40, 63 N. W. 95, that the statute is not a rule of pleading, but of evidence, the only effect of defendant's failure to comply with it being to cast upon him the burden of the issue as to the execution and delivery. If, then, the answer did amount to a denial, under this statute, the

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burden on this issue was with plaintiff; and, if it did not, it was on the defendant.

At the trial the plaintiff introduced the note in evidence, and then, without objection, accepted the suggestion of the court, and produced witnesses as to the execution and delivery of the note. It was shown that Garlock signed the note after it had been made out, by his direction, by the treasurer of the company; that Garlock signed all of its commercial paper; that a payment had been made thereon by him in behalf of the company, and out of its funds; and that subsequently the treasurer had refused to pay the balance, claiming that it was not an indebtedness of the company. There was no attempt on the part of the plaintiff to show the consideration for the paper, or that to any extent the grain company had been pecuniarily benefited by it. The plaintiff also introduced testimony as to the indorsement by Garlock, but failed to show that he had at any time been notified of its nonpayment. There was no claim made in the pleadings or by the evidence that Garlock had been notified of, or that the note had been protested for, nonpayment; and, when plaintiff rested, counsel for defendant Garlock moved that the case be dismissed as to his client, while counsel for the defendant grain company made a motion that a verdict be directed in favor of their client. Thereupon plaintiff's counsel moved to amend the complaint by alleging that Garlock placed his name on the back of the note at the time of its execution, and before delivery, for the purpose of giving it credit, as a part of the same transaction, and for the same consideration. This amendment the court refused to allow. It then granted the motion made in behalf of Garlock, but, as to the grain company, it held that a case had been made out for the jury. But when both parties rested, and upon the renewal of the motion in behalf of the grain company, the court directed, and the jury returned, a verdict in its favor.

2. The introduction of the note in evidence did not make a prima facie case for plaintiff, nor was there any other proof upon which the jury could have found that Garlock was authorized to execute and deliver such an instrument in behalf of the company of which he was president. It was made payable to his own order, and was prima facie void. It was made by the president of a corporation,

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in its name, seemingly for his own accommodation, and thus bore on its face evidence of its invalidity. He could not, by virtue of his general authority as agent, bind the corporation in a contract made by him as such agent with himself; and he had no authority whatsoever, unless expressly given, to bind it by the execution and delivery of negotiable paper which apparently was issued for his own use and benefit. And notice of this want of authority was in the instrument itself. Third Nat. Bank v. Marine Lumber Co., 44 Minn. 65, 46 N. W. 145; Wilbur v. Lynde, 49 Cal. 290; Chemical v. Wagner, 93 Ky. 525, 20 S. W. 535; Anderson v. Kissam (C. C.) 35 Fed. 699.

As to the extrinsic testimony introduced by plaintiff for the purpose of making out a prima facie case, it was wholly insufficient. That Garlock executed and delivered bills and notes for the corporation had no tendency to show authority in him to execute and deliver one for his own accommodation; and that he had made a payment on the note in suit out of the corporation funds simply showed the performance of another unauthorized act, namely, his appropriation of company funds to the payment of what was apparently its note made for his accommodation. Later on in the trial it was proven that Garlock caused the note to be made out payable to his own order at the request of plaintiff's agent, but this evidence had no tendency to show that it was not just what it appeared to be,—the grain company's accommodation paper. In no way did it characterize the transaction, or tend to prove that the note was actually that of the company. The burden of proof was on the plaintiff to show that the obligation was in fact that of the company.

3. It is well to say that the efforts made to prove some sort of a ratification of the execution and delivery of this note were futile. Garlock's acts of recognition, if there were any, had no effect. For obvious reasons, he could not ratify his own unauthorized act, and thus bind the company, for his want of authority at the inception would continue to the end.

4. The plaintiff having wholly failed to make out a case for recovery as against the grain company, it is unnecessary to discuss the al-

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leged errors of the court when ruling on the admission of evidence offered in defendants' behalf. If error, it was without prejudice.

5. The ruling with respect to the proposed amendment of the complaint so as to charge Garlock as an anomalous indorser (a signer on the back before delivery, and for the purpose of giving credit to the paper) was correct, even if, under the circumstances, the matter was not wholly one of discretion. The status of Garlock was defined and settled when the note was made payable to his order, and he placed his name on its back. Indorsement by the payee of a note imports a distinct, defined, and certain liability, and it cannot be shown by parol that his agreement was that of a maker instead of that of an indorser. Coon v. Pruden, 25 Minn. 105; Peoples Bank v. Rockwood, 59 Minn. 420, 423, 61 N. W. 457; Bowler v. Braun, 63 Minn. 32, 65 N. W. 124. It follows that the case was properly dismissed as to Garlock.

Judgment affirmed.

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CHRISTOPHER H. SMITH and Another v. NATIONAL CREDIT INSURANCE COMPANY and Others.

November 29, 1899.

Nos. 11,844—(105).

Distribution of Fund for Policy Holders—Judgment as Evidence—Pleading.

A judgment rendered against an insurance company and against its assignee after it has assigned, under the laws of this state, for the benefit of its creditors, is not evidence, as against parties entitled to participate in the distribution of the fund deposited with the state insurance commissioner for the benefit of all policy holders, as provided by G. S. 1894, § 3332, of the right of the judgment creditor to participate in such distribution. And therefore allegations in a complaint of an alleged policy holder, in a proceeding instituted to distribute such fund, of the commencement of an action in a court having jurisdiction, and the rendition and entry of a judgment on a cause of action arising out of the policy, are immaterial and irrelevant. The right to become a distributee of the fund must be based upon the original cause of action, not on a judgment.

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Action in the district court for Hennepin county by Christopher H. Smith, as insurance commissioner of the state of Minnesota, and one of the policy holders of defendant company against its assignees in insolvency and its policy holders. The purpose of the action was to determine who was entitled to a fund in the hands of the insurance commissioner, to have a receiver appointed to take charge of the fund, and to have it distributed among those entitled to participate therein. The Beckman Company petitioned for leave to intervene and participate in the distribution, and from an order, McGee, J., denying its application for leave to file its proposed complaint in intervention and granting leave to file a complaint setting forth its original cause of action only, but not the judgment referred to in the opinion, it appealed. Affirmed.

Robert G. Morrison, for appellant.

C. J. Rockwood and *Fifield, Fletcher & Fifield*, for respondents.

COLLINS, J.

The nature and object of this action have been stated in the opinions on former appeals. 65 Minn. 283, 68 N. W. 28; 72 Minn. 364, 75 N. W. 596. At this time a new phase of the litigation is presented. It was supposed, when the action was commenced, in September, 1895, that all of the policy holders except the one which had been made a plaintiff were named as defendants; but it appears that the firm of Beckman & Co., to whose interests the present intervenor (appellant) succeeded as hereinafter stated, had been inadvertently omitted. There is some question as to when said firm, or its successor, a corporation in the state of Ohio, had notice of this action; but in the month of April, 1899, the latter petitioned for leave to intervene, and to participate in the distribution of the trust fund about to be distributed. The court had made its findings of fact and conclusions of law in the proceeding February 1; ordering such distribution among creditors who had proven their claims, and were named in certain schedules. To its moving papers the petitioner attached a copy of its proposed complaint in intervention.

In this complaint it was alleged (briefly stated) that the defendant insurance company had issued a policy of indemnity to Beck-

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man & Co., a partnership, in the year 1893, on which said firm suffered loss in an amount stated; that the insurance company was notified of such loss; that in November, 1894, the amount of such loss was adjusted and agreed on by Beckman & Co. and the company, and that the latter thereupon agreed to pay this amount within 60 days; and that no part of the amount had been paid. A cause of action was fully and completely stated in this portion of the proposed complaint.

It was then distinctly and separately averred that in a court of general jurisdiction, duly created and organized, in the county of Cuyahoga, in the state of Ohio, Beckman & Co. had commenced an action against the insurance company on April 13, 1895, to recover the amount of their losses, in which action said company appeared and answered, and that, after it assigned for the benefit of its creditors, its assignee continued and conducted its defense, being represented by an attorney at the trial. It was then alleged that such proceedings were had in this action as resulted in the rendition and entry of a judgment for a stated sum against the defendant company in said court on October 27, 1897. Other allegations followed, as to nonpayment of the judgment, and its assignment to the petitioning corporation.

The petition was denied, as made, but leave was given to file a complaint in which the original cause of action, only, should be set forth. The appeal is from that part of the order which denied to the petitioner the right to allege in its complaint the commencement of the action in the Ohio court, and the subsequent proceedings including the rendition and entry of the judgment. The question is as to the right or power of the court to impose any condition when permitting the petitioner to intervene in the action.

The fund in controversy was deposited with the state insurance commissioner, in accordance with the provisions of G. S. 1894, § 3332, in trust for the benefit of all policy holders. The general creditors had no interest in it, except as to a surplus which might ultimately reach them, and as it might be distributed among the beneficiaries, thus reducing the total indebtedness of the company. By virtue of their policies, and not otherwise, the policy holders had, each and every one, a specific lien, attaching as policies were

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issued, but actually relating back, in case of a distribution, to the date of the deposit. The absolute right to have the fund distributed among the creditors having liens became complete and enforceable when the company was declared insolvent; and those who seek to participate must show, not only that they have claims against the insolvent company, but that their claims arise out of policies held by them. It is the actual, specific interest in or lien upon the fund which gives the right to become a distributee.

The judgment which the petitioner attempted to set up in the complaint as a cause of action, and which, its counsel argues, was and is conclusive upon all policy holders, because conclusive on the insurance company and its assignee, was not rendered until about two years after the assignment. As against parties having a specific lien and interest in the deposited fund, it was not evidence of any of the facts upon which it was based. It would not establish the fact upon which the petitioner's right to participate depends, namely, that Beckman & Co. had acquired a specific lien and interest through the issuance of a policy of insurance. It would, if alleged in the complaint and proven on the trial, simply be evidence of a debt owing from the debtor to the creditor from and after its rendition. The principle which controls here is exactly that applied in Corser v. Kindred, 40 Minn. 467, 42 N. W. 297, and Falconer v. Cochran, 68 Minn. 405, 71 N. W. 386; and the judgment which the petitioner attempts to have declared conclusive upon parties not in privity with the judgment debtor cannot be distinguished from those considered in Danforth v. National Chemical Co., 68 Minn. 308, 71 N. W. 274, and Buffum v. Hale, 71 Minn. 190, 73 N. W. 856. The allegations in the proposed complaint as to the action in the state of Ohio and the procuring of the judgment were immaterial and irrelevant, and the court very properly ordered that, if a complaint was filed in intervention, it should be purged of all useless matters. This disposes of the appeal.

Order affirmed.

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STATE v. JOHN RYAN.

November 29, 1899.

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Nos. 11,857—(19).

Bastardy.

On the trial of an action brought under the provisions of G. S. 1894, c. 17, the inquiry is as to the paternity of the child, and not as to the exact day on which it was begotten. But, under some circumstances, the occasion, as testified to by the complaining witness, may become material although the exact day is not.

Evidence.

Held, under the peculiar condition of the evidence in the case at bar, that the trial court erred when it modified certain requests to charge, submitted by counsel for defendant, by interpolating the words "on or about" immediately preceding the date stated in the requests, such date being that fixed with great positiveness by the complainant as the one on which she had sexual intercourse with the accused, and also erred in other portions of its charge having a bearing on the same question.

In the district court for Olmsted county defendant was convicted of being the father of a bastard child; and from an order, Snow, J., denying a motion for a new trial, he appealed. Reversed.

Thomas Spillane and *W. Logan Brackenridge*, for appellant.

Chas. C. Willson, for respondent.

COLLINS, J.

This was an action under the provisions of G. S. 1894, c. 17, commonly known as the "Bastardy Act," in which the defendant was found guilty. His appeal is from an order denying a motion for a new trial, and the order will have to be reversed on account of prejudicial error committed by the court when charging the jury.

A part of the facts, as testified to by the complainant, will have to be stated for a full understanding of the error in the charge. The complainant was aged 27 years, and had known defendant about 10 years. She was a dressmaker, generally employed in town, while her father's house was on a farm a short distance out. The defendant had paid her considerable attention for some three years, and she had frequently been in his company when no other

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person was present. On the evening of August 25, 1897, she was alone at her father's house, and about half past nine o'clock defendant called. Her testimony was that soon after defendant arrived he put his arm around her, and partly carried her into the bedroom, where they had intercourse, and the child was begotten. She was positive as to the date and the occasion. She testified that he remained at the house alone with her until after one o'clock; that on this occasion he had intercourse with her but once; and also that this was the first and only time she had ever had sexual connection with him. She also testified as to her physical condition at this particular time, and that for two days she had been menstruating, with more or less flow, and that this condition continued for about two days afterwards. It was the opinion of medical experts, sworn in defendant's behalf, that, while it was possible for a woman to become pregnant under such circumstances, it was highly improbable. On her cross-examination the complainant again fixed the day as being August 25, 1897, with the greatest positiveness, and adhered strictly to the circumstances and the condition she was in, physically, as previously detailed.

With this condition of the evidence, counsel for defendant made several requests to charge of about the same import, although differently worded. These requests were, in effect, that unless the jury should find that defendant had sexual intercourse with the complainant on August 25, 1897, and that the child was begotten on that day, the defendant could not be found guilty. The gist of these requests was that the defendant must be declared not guilty unless the jury found, by a preponderance of evidence, that the complainant's statement as to the exact day on which she met defendant at her father's house was literally true. The court might have safely refused to give these requests as written, but, instead of so doing, each one was modified so as to read that, unless the jury found that defendant had sexual intercourse with the complainant "on or about" August 25, he should be found not guilty. The court also charged that the particular time and place of the intercourse were immaterial, so long as it occurred within the time mentioned by the physicians as the usual period of gestation; that it is not the law to confine the public prosecutor to the exact date

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set forth in the complaint; and that, if the evidence satisfied the jury that the intercourse took place within "that period of about a week," the defendant could be found guilty. Counsel for defendant excepted to the modifications referred to, and also to the portions of the charge above mentioned.

It is true that the inquiry in this class of cases is as to the paternity of the child, and not as to the exact day on which it was generated; but it is essential to allege a date in the complaint, and to substantiate the allegation at the trial. The exact day on which the child was begotten is immaterial, except as it bears upon the principal question, which is whether or not the accused is the father of the bastard. State v. Smith, 47 Minn. 475, 50 N. W. 605. And the court below could have safely charged the jury in this action that, while the exact date of the intercourse between these parties was not material, the occasion was, because of the peculiar circumstances testified to by the complainant. But this is not what the court charged, nor was the charge equivalent to this. It gave the jury an opportunity wholly to reject the testimony of the plaintiff as to what transpired on the evening of August 25, and at the same time to conclude that the child was begotten on some other occasion about that day, it having been shown that the parties were together on other occasions not far from August 25. Under the charge as given, including the modification of the requests of counsel, the jury might have been misled on the subject of dates, and have felt justified in disbelieving the complainant's account of the time, place, and circumstances under which she became pregnant.

If her statement as to the occurrence was disbelieved and rejected by the jury, there was an entire absence of evidence to support the verdict. Sexual intercourse at any other time or place or circumstances than at the father's house on the evening of August 25 was positively denied by the complainant. And, when considering what the jurors may have concluded as to her truthfulness, we must not forget that incredulity would naturally arise in the minds of ordinary men when listening to her statement that she, a woman 27 years of age, was so easily led astray by an old acquaintance, who previously had plenty of opportunities to approach her improperly if he desired, that there was but the single act that night,

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and that never thereafter did they have sexual connection. And we must also bear her physicial condition in mind, and that it was extremely improbable that she could become pregnant from intercourse under such circumstances. These are all matters bearing upon the probability that the jury may have placed an unwarranted construction upon the charge to defendant's prejudice, and have concluded that, although not satisfied of the truthfulness of the complaining witness when telling when and where and under what circumstances the child was begotten, they could convict because from the testimony it appeared that there were other opportunities for sexual intercourse. The peculiar circumstances of the case were such that the charge should not have been subject to misconstruction.

Order reversed, and a new trial granted.

DANIEL S. PIPER v. JOSEPH A. SAWYER and Others.

November 29, 1899.

Nos. 11,859—(124).

Judgment Ordered by Supreme Court.

Held, where a cause is reversed and remanded by this court with directions to the court below to proceed and award a particular judgment, such court below has no discretion in the matter, but must grant the judgment or relief so directed.

Res Judicata.

And that the question presented in this case is res adjudicata, under the decision in a former appeal; following Johnson v. N. W. Telephone Ex. Co., 54 Minn. 37.

Appeal by defendants Joseph A. Sawyer and Nellie A. Sawyer from a judgment of the district court for Steele county entered pursuant to the amended findings and conclusions of Buckham, J. Affirmed.

J. A. Sawyer, for appellants.

Wheelock & Sperry and *Robert Taylor*, for respondent.

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BROWN, J.

This is the second appeal in this case. See 73 Minn. 332, 76 N. W. 57. The facts, about which there is no controversy, are fully and clearly set out in the opinion on the former appeal, and need not be repeated at length here. To a proper understanding of this opinion the principal facts only need be stated.

At a date long prior to the commencement of this action, the plaintiff became the owner of four certain mortgages executed by defendants Sawyer and wife upon real property owned by them, and, to adjust the amount due thereon, and provide for the payment thereof, entered into an agreement with defendants in which the sum of $20,400 was fixed as the total amount due. Terms of payment thereof were agreed upon, and it was also agreed that defendants should convey the property to plaintiff, and plaintiff should in turn reconvey to defendant, Mrs. Sawyer; the deed to her to be delivered to and held by defendant Woodman until Sawyer and wife should pay such indebtedness. The deeds were duly executed, and delivered accordingly. Defendants failed to pay the indebtedness at the time and as required by the terms of the agreement, and plaintiff, acting on the theory that the new agreement operated only as a modification of the contract between the parties as made up by the mortgages, and that they were not merged therein, brought this action, and asked for the foreclosure of the four mortgages. The court below on the first trial held in harmony with this theory, and ordered judgment of foreclosure as to the four mortgages, from which judgment the former appeal was taken. It was held by this court on that appeal that this special agreement constituted an equitable mortgage, in which the four prior mortgages became merged. The judgment was reversed, and the cause remanded, with directions to the court below to amend its findings of fact and conclusions of law, ascertain the amount due on the equitable mortgage, and direct its foreclosure. The court below complied with this mandate, and defendants again appeal.

At the time of plaintiff's application to the court below for the amended findings, the defendants applied for leave to file a supplemental answer, setting up as a defense—to state it in substance and briefly—that, because plaintiff had brought his action to fore-

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close the original mortgages, and had refused defendants' offer to allow judgment of foreclosure as to the equitable mortgage, his remedy under the latter became lost, and he thereby estopped himself from asserting any rights thereunder. The court below denied this application, and this refusal is assigned as error. Although there are nine separate assignments of error, they all go to this one question. All the facts with reference to the four mortgages and the equitable mortgage are stated in the complaint, and are undisputed.

The identical question presented by the proposed supplemental answer was presented and argued to this court on the former appeal, and decided adversely to appellants, and is, therefore, res adjudicata. That decision became the law of the case, and the question cannot be reconsidered on this appeal. Johnson v. N. W. Telephone Ex. Co., 54 Minn. 37, 55 N. W. 829. And, besides, the cause was remanded to the district court on the former appeal with directions to award judgment of foreclosure as to the equitable mortgage, and that court had no alternative but to comply with that mandate. "Where a judgment is reversed and remanded with specific directions, the court below has no discretion in the premises, but must pursue the mandate of the appellate court." 13 Enc. Pl. & Pr. 846. For these reasons the judgment appealed from must be affirmed.

But we may remark, in passing, that the facts set up in the proposed answer do not constitute a defense, and, conceding authority in the court below to permit it to be interposed, the order rejecting it was proper for that reason. The doctrine of election of remedies has no application to the facts of this case. Plaintiff did not possess two inconsistent remedies for the enforcement of his rights. He possessed an incumbrance against defendants' property to the amount of $20,400 or more, with but one remedy to enforce the security, which was by foreclosure of the incumbrance, whether evidenced by the original mortgages or by the substituted equitable mortgage. He did not waive his rights under the equitable mortgage by asking in his complaint—which set out all the facts, both with reference to the original and the equitable mortgage—that the original mortgages be foreclosed. The plaintiff asked for the

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wrong relief, but the court was not precluded from granting him his proper relief. G. S. 1894, § 5413.

Judgment affirmed.

CARL H. KLEMER and Others v. MILLEDGE B. SHEFFIELD and Others.

December 4, 1899.

Nos. 11,747—(115).

Water—Enforcement of Contract Rights.

A private corporation, called the Cannon River Manufacturers' Association entered into an agreement with a millowner (defendant's grantor) on the Cannon river by which the latter agreed, among other things, to maintain on his premises a dam of sufficient height to create certain reservoirs of water. In an action by the plaintiffs, owners of other mills on the river, to compel defendant to comply with the terms of this agreement, *held*, that the plaintiffs had no cause of action; there being no privity between them and the Cannon River Manufacturers' Association, and the agreement being one exclusively between the association and the defendant's grantor, and in which the plaintiffs have no legal interest.

Plaintiffs not Privies to Contract.

The mere fact that plaintiffs acquired their mills by purchase from parties who were members of the association at the time the agreement was entered into creates no privity between them and the association.

Action in the district court for Rice county to quiet and establish the water and riparian rights of the parties in the Cannon river and to compel defendants to use the water in the river in accordance with certain agreements. The case was tried before Buckham, J., who found in favor of defendants; and from a judgment entered pursuant to the findings, plaintiffs appealed. Affirmed.

H. S. Gipson, for appellants.

A. D. Keyes, for respondents.

MITCHELL, J.

All of the plaintiffs and the defendants, other than Hunter, own mills operated by power derived from the water of the Cannon

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river. The court finds, in effect, that the defendants have not made any use of the water of the river which is in violation of plaintiffs' common-law right as riparian owners. The action is brought to compel the defendants to maintain a dam to create reservoirs and to use the water of the river in accordance with certain agreements, set out in the complaint, between former owners of the mill now owned by the defendants and the Cannon River Manufacturers' Association, a private corporation organized under the laws of this state "for the purpose of developing and improving the water power on Cannon river and applying the same to manufacturing purposes." The pleadings, findings of the court, and the briefs of counsel are quite voluminous, but in our opinion all the law necessary to be considered lies in a very narrow compass.

The agreements referred to were exclusively between the corporation and the then owner of the defendants' mill. No one but the parties themselves, or those in privity with them, has any legal interest in these agreements or any right to enforce them. There is no privity between the plaintiff and either the corporation or the defendants. None of the plaintiffs were even members of the corporation. The corporation never had any interest in the mills now owned by them. The parties to these agreements could have modified or wholly set them aside at their pleasure, and none of the plaintiffs or their grantors could have successfully objected. None of the plaintiffs have succeeded to any of the rights of the corporation, and they make no such claim, except that by purchase all of them, except one, have acquired properties which at the time these agreements were made were owned individually by members of the corporation. The situation is very tersely summed up by the trial judge substantially as follows: In times past certain parties owning mills on the river, and then interested in improving its water powers, formed a corporation for that purpose, and this corporation agreed with another party owning a mill site on the stream that he should maintain certain reservoirs on the river; and now the plaintiffs attempt to enforce this agreement on their own behalf because some of them have, in the course of time, and by process of purchase, acquired mill properties which were formerly owned by members of the corporation.

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In view of some suggestions in counsel's brief, it may be proper to add that the case turns, not upon any question of pleading or practice, but upon the proposition that the facts found do not constitute a cause of action. To the suggestion that plaintiffs are entitled to recover irrespective of the agreements referred to, the answer is that they are foreclosed by the finding of the court to the contrary; none of the evidence being before us, and all the assignments of error going to the question of the sufficiency of the findings of fact to support the conclusions of law.

Judgment affirmed.

CANTY, J.

I concur in the result, but not for the reasons given in the foregoing opinion. On April 15, 1884, the Polar Star Mill Company was the owner of the mill and water power now owned by defendant; the same being the water power situated the furthest up of the series of water powers on the river. On that day a contract was entered into, the first part of which reads as follows:

"This indenture, made and entered into by and between the Polar Star Mill Company of Rice County, Minnesota, party of the first part, and the Cannon River Manufacturers' Association, party of the second part, composed of owners of mills on the Cannon river below Cannon lake, both corporations being created and organized under the general laws of the state of Minnesota, witnesseth, that whereas, said Manufacturers' Association, party of the second part, is organized for the purpose of improving the water powers on the Cannon river, and is desirous of raising the water in the Cannon river and the lakes through which it flows, and converting the same into reservoirs for the benefit of the water powers on said Cannon river."

The contract then provides for raising the dam of the Polar Star Mill Company so as to store a greater quantity of water in times of high water, and for other purposes, among which is the following:

"The Polar Star Mill Company shall at all times manage and regulate the use of the water in their dam so as to give the other mills below on said river, as far as practicable an equal enjoyment of the natural flow of the water."

From these and other provisions in the contract, and from all the

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surrounding circumstances appearing in the record, it seems to me clear and conclusive that the contract was made for the benefit of the different mill and water-power owners on the river below the mill site of the Polar Star Mill Company. If these owners had in their own name entered into the contract with the Polar Company, the contract would certainly be binding on all parties, and the benefits and burdens of its covenants and conditions would run with the land, and each and every party to it, in favor of and against his grantees, at least in equity. See American notes to Spencer's Case, 1 Smith, Lead. Cas. (9th Ed.) 174, 212–221, 5 Coke, 14. The principle is the same as that involved in the party-wall cases of First Nat. Bank v. Security Bank, 61 Minn. 25, 63 N. W. 264; Kimm v. Griffin, 67 Minn. 25, 69 N. W. 634.

If the owners of the different mills below that of the Polar Company are the cestuis que trustent for whose benefit the contract was made, they can, in equity, maintain an action upon it, and their rights will be enforced the same as if the contract was made by them in their own names. But it does not appear that these proposed beneficiaries ever accepted the benefits of this contract. True, several of the stockholders or members of the Manufacturers' Association were owners of, or members of, the firms or corporations which owned the mills below the mill of the Polar Company; but this alone does not prove, at least conclusively, that these owners ever accepted the benefits of the contract between the Polar Company and the association. Unless these owners accepted the benefits of the contract, and surrendered their common-law rights in the river, so far as these rights are inconsistent with the rights provided by the contract the parties to the contract could not perform it or carry it out. Not only so, but these proposed beneficiaries should have elected promptly to accept the benefits of the contract, and to be bound by it. If they have waited all these years, it is now rather late to revive the scheme originally contemplated by their contract. In my opinion, the judgment should be affirmed because it does not appear that the proposed beneficiaries ever accepted the contract, or agreed to be bound by it.

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SULLIVAN H. McCOLLISTER and Others v. JAMES H. BISHOP and Others.

December 4, 1899.

Nos. 11,783–(102).

Bond of Assignee—Leave of Court to Sue.

Held, that the omission to obtain leave of court to sue on the bond of an assignee in insolvency is not ground of general demurrer to the complaint. Following former decisions.

Complaint Good as to Surety.

Also, that the complaint states facts constituting a cause of action against the surety on the bond,—at least, for fraud and deceit in inducing the principal, by false and fraudulent representations, to deposit the trust fund in an insolvent bank where it was lost.

G. S. 1894, § 2849.

Also, that G. S. 1894, § 2849, subd. 3, is constitutional.

Trustee a Guarantor of Trust Funds.

Also, that, if a trustee enters into any arrangement with reference to trust funds which surrenders or limits his control over them, he becomes a guarantor of the fund, irrespective of his motives, or whether his surrender of control was the cause of the loss of the fund. But *held*, further, that the facts do not bring this case within that rule.

Appeal by defendants Bishop and Fidelity & Deposit Company of Maryland from an order of the district court for Hennepin county, Brooks, J., overruling demurrers to replies. Affirmed as to the company, and reversed as to Bishop.

Carman N. Smith, for appellants.

Smith & Smith and *Byron Sutherland*, for respondents.

MITCHELL, J.[1]

This action was brought by the plaintiffs, as creditors of the People's Savings & Loan Association, an insolvent corporation, against defendant Bishop, former assignee of that association, and the Fidelity & Deposit Company of Maryland, the surety on Bishop's bond

[1] BROWN, J., took no part, the case having been argued before he took his seat.

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as assignee. The defendant Sutherland is the present receiver of the association, appointed in place of Bishop.

It is difficult to tell from the complaint whether this action was intended to be on the bond, or one for fraud and deceit. After alleging the insolvency of the People's Savings & Loan Association, its assignment of all its assets under the insolvency law to Bishop and the execution by him as principal, and by the Fidelity & Deposit Company as surety, of a bond conditioned for his faithful performance of all his duties, the complaint further alleges that, when Bishop applied to the Fidelity & Deposit Company to become surety on his bond, it made it a condition precedent to doing so that he should agree that all the moneys and funds belonging to the People's Savings & Loan Association which should come into his hands as assignee should be deposited with the Northern Trust Company, to which Bishop assented, and inserted it as one of the conditions of his written application to the Fidelity & Deposit Company to become his surety; that at this time the Fidelity & Deposit Company had full notice that the Northern Trust Company was insolvent, and was not a secure and safe place to deposit money, and that money deposited in it by Bishop would not and could not be repaid to him when wanted, but that the Fidelity & Deposit Company then and there represented to Bishop that the Northern Trust Company was a solvent and reliable institution, and that all moneys deposited with it would be promptly repaid to him; that Bishop, believing these representations as to the solvency of the Northern Trust Company, and in reliance upon them, afterwards deposited with the Northern Trust Company trust funds to the amount of $11,000; that in fact the Northern Trust Company was not solvent, or a safe and secure place to deposit money, as represented by the Fidelity & Deposit Company; that part of this money, to wit, $5,763.91, never was repaid, and that in December, 1896, the trust company failed, and on its own application was declared insolvent by the district court; that, upon the appointment of Sutherland as Bishop's successor, the court made an order requiring the latter to pay over to the former all property and money in his hands as assignee; that Sutherland demanded payment of this $5,763.91 from both Bishop and the Northern Trust Company, but both of them

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have wholly failed to pay. The Northern Trust Company was a corporation organized under the act for the organization of annuity, safe-deposit, and trust companies (G. S. 1894, § 2841 et seq.). It is also alleged that the deposit of the money with the Northern Trust Company was not made under or in pursuance of any order of court.

To the replies to their answers each of the defendants, Bishop and the Fidelity & Deposit Company, interposed a separate general demurrer, both of which the court overruled. Under a familiar rule, these demurrers reach back to the complaint.

1. The first point made by the defendants is that, treating this as a suit on the bond, the complaint did not state a cause of action, because it did not allege that the court had given the plaintiffs permission to sue on the bond. This court has repeatedly held that this is no part of the cause of action, and cannot be reached by general demurrer. Leuthold v. Young, 32 Minn. 122, 19 N. W. 652; Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191. Counsel for defendants seeks to distinguish these cases from the present one, but we do not think that the attempted distinction is well taken.

2. We are satisfied that the complaint states a cause of action against the Fidelity & Deposit Company,—at least, for fraud and deceit. If it be held to be an action for fraud and deceit, the question of plaintiffs' legal capacity to sue cannot be raised by general demurrer.

3. The complaint either states a cause of action on the bond against Bishop, or it states no cause of action at all against him. The complaint undoubtedly states facts sufficient to constitute a cause of action against him, unless neutralized and avoided by other allegations. It will have been observed that the complaint alleges, in substance, that Bishop deposited the money with the Northern Trust Company in good faith, honestly believing that it was a solvent and safe depositary. It was an institution with which he was authorized to make the deposit, and as to which the statute expressly provided that when he made such a deposit

"He and his sureties shall thereafter be relieved and discharged from all liability therefor until the same shall again be delivered by said corporation to him or to his successors." G. S. 1894, § 2849, subd. 3.

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This provision of the statute may be an unwise one, but we fail to see any ground upon which a court would be justified in declaring it unconstitutional. It was added to the original act of 1883 by the amendatory act of 1885 (chapter 3), and is germane to the general subject expressed in the title of the original act. Nor is there any ground for limiting its application to deposits made pursuant to an order of court. Where a court orders one of its officers to deposit funds in a particular place, it is the court, and not the officer, who makes the deposit, and the latter needs no such protection as that afforded by this statute. Moreover, the last clause of subdivision 3 is an entirely independent provision, in no way dependent upon the two preceding ones, and extends to persons acting in a trust capacity, who are neither officers of court nor in court, and consequently are not subject to its orders or directions.

4. Counsel for the plaintiffs insist, however, that, irrespective of the questions of the validity and construction of this statute, the allegations of the complaint as to the agreement between Bishop and his surety that the trust funds were to be deposited with the Northern Trust Company render the former liable for the money.

The principle invoked is that, if a trustee enters into any arrangement with reference to the trust funds which surrenders or limits his control over them, he is guarantor of the fund, irrespective of his motives, or whether his surrender of control was the cause of the loss. This undoubtedly is the rule, and it is an eminently salutary one. But in our judgment the facts pleaded do not bring this case within it. It is customary, as well as entirely proper, for these fidelity companies, before executing bonds as surety, to insist on being advised, and having some understanding with their proposed principal, as to where the trust funds will be deposited. This is a matter which affects the risk which they will assume if they execute a bond. It also enables them to keep track of the conduct of their principal with regard to the disposition of the fund. The facts pleaded in this case do not show any surrender in whole or in part of the principal's absolute control over the trust fund. He had the right to deposit the money in his own name as assignee. He had the right to draw it out as he saw fit. His surety had no control of, or veto power over, these matters. He had the absolute

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legal power to change the depositary whenever he saw fit. It is true that, if the Fidelity & Deposit Company was dissatisfied with his doing so, it could take steps to discharge itself, and to require him to give a new bond. But this it had the right to do under any circumstances. Laws 1895, c. 295.

Counsel greatly rely on the leading case of Salway v. Salway, 2 Russ. & M. 215, afterwards appealed to the house of lords, and there affirmed, under the title of White v. Baugh, 3 Clark & F. 44. But the facts in that case are clearly distinguishable, and at the same time illustrate the application of the rule invoked here. In that case, under an agreement between a receiver and his sureties, funds were by the receiver turned over to one Anderson, a partner of one of the sureties, and by him deposited in the name of the two sureties; and all drafts upon the moneys were to be written out by Anderson, and then signed by the receiver, thus placing the fund where the receiver could not draw out a dollar without Anderson's approval, he being thus made a necessary party to the drawing out of every cent of the money. Our conclusion is that the facts pleaded did not, of themselves, amount to a surrender or limitation of Bishop's power of control over the fund, so as to render him liable as guarantor of the fund, within the rule invoked.

Order affirmed as to the Fidelity & Deposit Company, and reversed as to Bishop.

JOSEPH McKIBBIN and Others v. GREAT NORTHERN RAILWAY COMPANY.

December 4, 1899.

Nos. 11,790—(98).

Delivery of Sample Trunk.

In an action to recover the value of a sample trunk and contents, consisting of merchandise, belonging to the plaintiffs, which they claim was delivered by one of their commercial travelers to the defendant, as a passenger, to be transported as his baggage on one of its passenger trains, *held*, that upon the evidence the question of the delivery of the trunk was one for the jury.

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Transportation of Merchandise as Baggage of Salesman.

Also, assuming that the trunk had been delivered to the defendant, neither upon the admitted manner of doing business between the plaintiffs and defendant nor upon any general custom of which the courts can take judicial notice was there evidence sufficient to justify the court in holding that the defendant had undertaken to carry merchandise belonging to the plaintiff as the baggage of their traveling salesman.

Same—Judicial Notice.

While courts will take judicial notice of the fact that it is the general custom of common carriers by railroad to carry sample trunks and their contents, consisting of merchandise, as the baggage of commercial travelers, which belong, not to the passenger, but to his employer, yet they will not take judicial notice of the conditions or limitations under which this is done.

Action in the district court for Ramsey county to recover $1,090 and interest, the value of a sample trunk alleged to have been lost by defendant's negligence. The case was tried before Brill, J., who directed a verdict in favor of plaintiffs for $1,109; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

C. Wellington, for appellant.

The liability of a carrier in respect to baggage is incident to the relation of carrier and passenger, and is personal to the passenger. Defendant is not liable to plaintiffs for damage to articles owned by them and carried by their salesman as his baggage.. There being no contract between plaintiffs and defendant, they cannot maintain this action by virtue of any agreement contained in the tickets; nor by reason of the relation existing between them and Roeller, when knowledge of such relation was not brought home to defendant; nor because they were owners of the goods, unless knowledge of the ownership and of the fact that the goods were in the trunk was brought home to defendant, and such trunk accepted with such knowledge. Pennsylvania v. Knight, 58 N. J. L. 287; Stimson v. Connecticut, 98 Mass. 83; Alling v. Boston, 126 Mass. 121; Talcott v. Wabash, 66 Hun, 456; Missouri v. Liveright, 7 Kan. App. 772; Humphreys v. Perry, 148 U. S. 627; Blumantle v. Fitchburg, 127 Mass. 322; Cahill v. London, 10 C. P. (N. S.) 154; Haines v. Chicago,

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St. P., M. & O. Ry. Co., 29 Minn. 160; Southern v. Clark, 52 Kan. 398; Toledo v. Dages, 57 Oh. St. 38. In the absence of active negligence or misfeasance on part of defendant, the action cannot be maintained as a common-law liability. Wunsch v. Northern Pac. R. Co., 62 Fed. 878; Meux v. Great Eastern (1895) 2 Q. B. 387.

The question of delivery should have been submitted to the jury. To constitute delivery it is not enough that the baggage be placed on the premises of the carrier. It must be delivered at the usual place of reception of such baggage, and the attention of the carrier must be called to the fact. Green v. Milwaukee, 41 Iowa, 410; Hickox v. Naugatuck, 31 Conn. 281; Camden v. Belknap, 21 Wend. 353; Rogers v. Long Island, 1 Thomp. & C. 396, 1 N. Y. Sup. Ct. 396; Grosvenor v. New York, 39 N. Y. 34.

Bishop R. Schriber, for respondents.

The liabilities of common carriers are independent of, though they may be modified by, contract. Hannibal Railroad v. Swift, 12 Wall. 262. A common carrier is an insurer of goods intrusted to him. Christenson v. American Ex. Co., 15 Minn. 208 (270). Under certain circumstances one may be entitled to the rights and protection of a passenger, though there be no consummated contract of carriage, the sole question being whether he in good faith intended to become a passenger. Cleveland v. New Jersey, 68 N. Y. 306; Lake Shore v. Foster, 104 Ind. 293; Green v. Milwaukee, 41 Iowa, 410; Hickox v. Naugatuck, 31 Conn. 281. If the carrier accept baggage for transportation, knowing that the owner does not intend to become a passenger, he accepts it to be carried as freight, and is liable as common carrier of goods. Hutchinson, Car. § 701; Sloman v. Great Western, 67 N. Y. 208. See Macrow v. Great Western, L. R. 6 Q. B. 612; Great Northern v. Shepherd, 8 Exch. 30; Smith v. Boston, 44 N. H. 325. Where an extra charge is collected for sample trunks by the carrier, knowing that they contain other than personal baggage, the transaction is tantamount to a shipment of freight, and the owner is the proper party to sue for loss. Perley v. New York, 65 N. Y. 374; Strouss v. Wabash, St. L. & P. Ry. Co., 17 Fed. 209; Collins v. Boston, 10 Cush. 506. See Pennsylvania v. Knight, 58 N. J. L. 287. Where a railroad com-

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pany receives on a passenger train the property of a passenger, with notice that it is not baggage, the company is liable as common carrier of merchandise. Liability begins when the property passes with assent into its possession. Hannibal Railroad v. Swift, supra; Oakes v. Northern, 20 Ore. 392, 394; Great Northern v. Shepherd, supra; Macrow v. Great Western, supra; Cahill v. London, 13 C. B. (N. S.) 818; Chicago v. Conklin, 32 Kan. 55; Texas v. Capps, 16 Am. & E. R. R. Cas. (Tex.) 118; Hoeger v. Chicago, 63 Wis. 100; Sloman v. Great Western, supra; Perley v. New York, supra; Strouss v. Wabash, St. L. &. P. Ry. Co., supra; Butler v. Hudson, 3 E. D. Smith (N. Y.) 571; Collins v. Boston, supra; Minter v. Pacific, 41 Mo. 504; Toledo v. Dages, 57 Oh. St. 38; Haines v. Chicago, St. P., M. & O. Ry. Co., 29 Minn. 160.

The delivery was complete, being according to the usual and customary method at the station. Merriam v. Hartford, 20 Conn. 354; Grosvenor v. New York, 39 N. Y, 34; Illinois v. Smyser, 38 Ill. 354; Rogers v. Long Island, 1 Thomp. & C. 396.

MITCHELL, J.[1]

Plaintiffs brought this action to recover the value of a sample trunk and contents alleged to have been delivered to the defendant as a common carrier to be transported on one of its passenger trains as the baggage of one of their traveling salesmen, and lost through its negligence.

The following facts are admitted by the pleadings: That plaintiffs are a manufacturing and jobbing firm engaged in the business of manufacturing and selling at wholesale furs and other merchandise; that for more than five years they had been employing traveling salesmen, who were accustomed to travel over defendant's road for the purpose of selling plaintiffs' goods; that during that time it has been their custom to buy from defendant 1,000-mile tickets for the use of these salesmen, and to supply these salesmen with "sample trunks," filled with samples of their goods, for their use in making sales; that this custom was known to the defendant, and that during all that time it had been the custom of the defend-

[1] The case having been submitted before BROWN, J., took his seat, he took no part.

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ant to permit these salesmen to carry these trunks, packed with this merchandise, on its regular passenger trains, and to check them as baggage, and carry them for the salesmen, to the weight of 150 pounds, gratuitously, in connection with the mileage ticket or passenger fare paid by each of the salesmen, and to charge additional compensation for all weight in excess of 150 pounds; and for the purpose of paying the "excess baggage" charges the plaintiffs have been accustomed to buy of the defendant what are known as "excess baggage tickets," which permitted the salesmen to carry these sample trunks and contents on passenger trains as excess baggage.

It also appears from the evidence that one of plaintiffs' salesmen, Roeller by name, was supplied by them with one of these 1,000-mile tickets and one of these "excess baggage" tickets. Whether these tickets were purchased from the defendant by the plaintiffs in person or by Roeller himself with money furnished by them does not distinctly appear, and is, as we think, immaterial. Suffice it to say that both tickets provided that they could be used only by Roeller, and did not state for whom, if any one, he was traveling.

Supplied with these tickets and four sample trunks filled with furs, the property of the plaintiffs, Roeller started out on one of his trips. Being at Wahpeton, and being about to go thence to Morris as a passenger on defendant's road, he sent the trunks, by an expressman, to defendant's passenger station, for the purpose of taking them with him as baggage on one of defendant's passenger trains. This was about 10 o'clock in the evening, and, consequently, after dark. The expressman unloaded them on the west end of the platform, as shown by the diagram of the station attached to the paper book. He looked for a truck to wheel them around to the south side of the platform, which would be next the track on which the train would come in, and in front of the station house, and opposite a bay window in which the station agent was at work. Not finding the truck, he went into the station, and inquired of the agent where it was. According to the expressman's statement, on being told by the agent that it must be somewhere around, he went out, and searched for it again, and, not finding it, returned to the station house, and so informed the agent, and told him "there were four trunks out there," and then went away. The testimony of the

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agent is that the expressman told him that there were four trunks "on the side platform"; that he looked out of the window, and saw five trunks on the side (south) platform. There was considerable conflicting evidence as to what was the usual and proper place for the delivery of baggage to the defendant; that on part of the defendant tending to show that it was the south side of the platform, and that baggage was never delivered to or received by it on the west end; while that on part of the plaintiffs tended to prove that it was not infrequently delivered and received at the west end, where the expressman left the trunks in question.

Shortly after the trunks had been brought down to the station, Roeller arrived, and informed the station agent that he had four trunks there, which he wanted checked to Morris, and at the same time produced his "1,000-mile" and "excess-baggage" tickets. The agent having inquired as to the weight of the trunks, and being informed that it was 800 pounds, prepared the checks, and then he and Roeller went out to find the trunks, and, after looking around for them, finally found three of them where the expressman had left them, but the fourth one, containing about $1,000 worth of valuable furs, was missing. It was afterwards discovered that it had been stolen, and rifled of its contents. This is the trunk for which a recovery is sought in this action. There was no evidence that the station agent had any notice or knowledge to whom the trunks or contents belonged, or that they all belonged to the same person, or what the contents were, or that he ever saw any of the trunks, or that he had notice that Roeller was a commercial traveler, or that he was in the employment of the plaintiffs, at least until after Roeller came in person to the station, and requested to have the trunks checked, which was after the trunk was stolen. It appears from the evidence that the sale of these 1,000-mile and excess-baggage tickets by the defendant is not limited to commercial travelers, but that they are sold to and can be used by any one who may wish to buy them.

Upon this state of the evidence both parties requested a directed verdict in their favor. The court refused the request of the defendant, and granted that of the plaintiffs, and directed a verdict in their favor for the amount claimed. After verdict, the defendant moved

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for judgment notwithstanding the verdict, or for a new trial, both of which the court refused to grant.

1. We are clearly of opinion that upon the evidence it was a question for the jury as to whether the lost trunk was delivered to the defendant; and for that reason, if no other, the court erred in directing a verdict.

2. The common-law rule is that, when a common carrier contracts, either expressly or impliedly, for the carriage of a passenger, the carriage of his reasonable and ordinary personal baggage is also undertaken as incidental to the principal contract, and as equally obligatory on the carrier. This undertaking only extends to such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not to merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as a sale and the like. But it is equally true that it is competent for a carrier to contract to carry as the baggage of the passenger merchandise or other property which is not designed for the personal use of or property not belonging to, the passenger, and, if it does so, it will be liable for it as a common carrier; and if, as in the present case, the property does not belong to the passenger, the owner may, in case of its loss, maintain an action for its value. Such a contract may be either express or implied. It may be implied from the general custom of the carrier in its manner of conducting business with the public, or from a particular custom or manner of doing business with a particular person.

In the present case the custom or manner of doing business between the plaintiffs and the defendant alleged in the complaint does not go far enough to charge the defendant with liability. For example, it is not averred that it was the custom of the defendant to permit the transportation of plaintiffs' sample trunks as baggage on its trains without being informed or having knowledge that they belonged to the plaintiffs, or without being advised as to the character or value of their contents. In short, the custom pleaded does not cover all the facts of the case. The same would be true of any general custom of which courts would take judicial notice. It is a matter of general knowledge (except with some courts) that it is

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the general custom of railroad companies to carry on their passenger trains, as the baggage of commercial travelers, trunks which, to the knowledge of the carrier, contain merchandise belonging not to the passenger but to his employer. Of this custom, to this extent, we would unhesitatingly take judicial notice. To hold otherwise would be to stultify ourselves. But we would not be justified in taking judicial notice of the conditions or limitations under which such trunks are thus received and transported as baggage. We are therefore of opinion that there was no evidence which justified the court in holding, as a matter of law, that the defendant undertook to carry as the baggage of Roeller merchandise belonging to the plaintiffs.

It appeared from the evidence that Roeller's "excess-baggage" ticket contained a stipulation upon his part that it was purchased by him upon his express declaration that the value of the baggage transported upon the same does not exceed $250. We are requested to determine the validity of this stipulation as a limitation upon the amount, if anything, which plaintiffs may recover. As this question was not litigated in the court below, and as the determination of it may depend on facts not before the court, we must decline to express any opinion upon it at this time.

We are satisfied that under the rule adopted in Cruikshank v. St. Paul F. & M. Ins. Co., 75 Minn. 266, 77 N. W 958, this is not a case where judgment should be ordered for the defendant, but one which should be remanded for a new trial.

Order reversed, and a new trial granted.

CANTY, J.

I concur in that part of the foregoing opinion which holds that it was a question for the jury whether or not the trunks in question were ever delivered to the station agent, and therefore the trial court erred in ordering a verdict for plaintiffs. It was a question for the jury whether or not the minds of the expressman and the agent ever met on the proposition that the trunks were delivered to the railroad company, or that the expressman sufficiently identified the particular trunks so that the agent should have known which ones they were I concur also in that part of the

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opinion which holds that the court should take judicial notice of the general custom of railroad companies to carry on their passenger trains, as the baggage of commercial travelers, sample cases, which contain the merchandise of their employers, carried from place to place with the traveling man for the purpose of being used as samples in making sales by him for his employer. But I cannot concur in the proposition assumed in the opinion that we must presume that there are conditions or limitations attached to this custom which prevent it from having any effect as applied to this case. If the conditions and limitations referred to are a part of the general custom, we should take judicial notice of them also. If they are not a part of such general custom, but are restrictions placed on the general custom by the particular railroad company, then the burden was on it to plead and prove the particular limitation or condition so placed by it on the carrying of sample cases. The fact that the station agent did not know that the trunks presented were sample cases containing valuable samples is immaterial. It is enough that he knew that in the course of business such sample cases were likely to be presented by a traveling man at any time.

ANNA BETCHER v. CAPITAL FIRE INSURANCE COMPANY.

December 4, 1899.

Nos. 11,804—(111).

Insurance Policy—Increase of Risk—Expiration of Permit—Judicial Notice of Fireworks.

The defendant issued to the plaintiff a policy of insurance against fire on a stock of merchandise. This policy was in the Minnesota standard form, and contained, among others, a provision that the policy should be void if, without the written consent of the insurers, the situation or circumstances affecting the risk should, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of risk. Subsequently the plaintiff, without the knowledge or consent of the defendant, stored or permitted to be stored a large stock of explosive fireworks in the same building which contained the insured property. Still later the plaintiff applied to and received from defendant's agent a

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permit to store the fireworks in the building for 15 days. At the time this permit was issued, defendant's agent ascertained the fact that the fireworks had already been stored in the building. The plaintiff did not remove the fireworks at the expiration of the permit, but continued to keep them in store in the building for 11 days longer, when their explosion caused the loss of the insured property by fire. The defendant had no notice that the fireworks were kept in the building after the expiration of the permit. When the plaintiff presented proofs of loss, the defendant expressly repudiated all liability on the policy, claiming that it was void because of the foregoing facts, but at the same time objected to the sufficiency of the proofs. *Held*, that the courts will take judicial notice of the fact that the storage of explosive fireworks in the same building increased the risk of the loss of the insured property by fire.

Waiver.

Also, that the issuing of the permit amounted to a waiver of any prior forfeiture of the policy, but not to an implied agreement to waive any future forfeiture, or to a consent that the fireworks might be stored in the building after the expiration of the period of the permit.

Forfeiture.

Also, that when the permit expired, and the fireworks were not removed, the policy became ipso facto void; the defendant was not required to do any affirmative act declaring the forfeiture, nor did it owe the plaintiff any duty to give her notice to remove the fireworks.

No Waiver of Forfeiture.

Also, that the fact that the defendant, when denying its liability on the policy, and insisting that it was void, at the same time objected to the proofs of loss, did not amount to a waiver of the forfeiture.

Action in the district court for Hennepin county to recover $500 on a fire insurance policy. The case was tried before Elliott, J., who directed a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Albert H. Hall and *C. J. Cahaley*, for appellant.

Brown, Reed, Merrill & Buffington, for respondent.

MITCHELL, J.

This action was brought on a fire insurance policy on a stock of merchandise contained in a building known as "No. 246 Nicollet Avenue," in the city of Minneapolis. The policy is what is known

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as the "Minnesota Standard Policy," and contained the following provision:

"This policy shall be void * * * if without such consent [the written consent of the insurer] the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks."

The execution of the policy and the total destruction of the property insured were admitted by the defendant; but it alleged, in the nature of a plea of abatement, that the parties disagreed as to the amount and value of the property destroyed, and that the plaintiff refused to have the amount of her loss ascertained and determined by referees, as provided by the policy in such cases. It may be assumed that the evidence shows that the defendant had waived this provision by its express repudiation of all liability on the policy because it had become absolutely void under the provision above cited. But asserting this plea in abatement was not inconsistent with, nor a waiver of, any defense on the merits going to defendant's liability on the policy. Hence this matter may be dismissed without further consideration.

The evidence is conclusive that after the execution of the policy, and while it was in force, the plaintiff, without the knowledge or consent of the defendant, stored, or permitted to be stored, in the building in which the insured property was situated, quite a large stock of fireworks, consisting of skyrockets, Roman candles, mines, firecrackers, torpedoes, giant firecrackers, percussion caps, and colored fires. Even if there was no direct evidence on the question, we would take judicial notice of the fact that the storage of such articles caused an increase of the risk. Indeed, we do not understand that this is disputed by the plaintiff. It was the explosion of these fireworks that caused the loss in this very case. The court directed a verdict for the defendant.

The main contention of the plaintiff is that there was evidence tending to prove that the defendant had consented to the storage of the fireworks in the building, or at least subsequently waived any forfeiture of the policy on account of their storage, and therefore the

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court erred in not submitting the case to the jury. The facts established by the evidence are that the policy was issued in September, 1897; that the fireworks were stored in the building about July 9, 1898; that about August 1 the plaintiff, through her agent, applied to the insurance broker through whom the policy had been procured, for a permit for the storage of the fireworks in the building; that for the additional premium of $2.50 the broker secured from the defendant's agent, and delivered to the plaintiff, the following permit, which was attached to the policy, to wit:

"Permission granted for the storage of fireworks in the within-described building for the period of 15 days. Additional premium, $2.50. This slip attaches to, and forms a part of, the policy. * * * Dated August 1, 1898."

It also appears that the insurance broker knew when this permit was applied for that the fireworks had been already stored in the building. The fireworks were not removed at the end of the 15 days, but still remained in the building when the fire occurred, on August 26, 1898. There is no evidence, however, that the defendant had any knowledge of that fact until after the fire.

Assuming, for the sake of argument, that the broker was the agent of the defendant in the premises, there is nothing in these facts tending to prove consent on the part of the defendant that these fireworks might be stored in the building after August 15, or an agreement in advance to waive the forfeiture of the policy in case their storage was continued after that date. The issuing of the permit, under the circumstances, amounted to a waiver of any prior forfeiture, but in no way implied an agreement to waive any future act of forfeiture, or to a consent that the fireworks might continue in store after the period of the permit should have expired. The defendant owed plaintiff no duty to give her notice to remove the fireworks at the expiration of the permit. That was a matter exclusively for her to see to. According to its terms, the policy became ipso facto void by the act of the plaintiff in keeping the fireworks in the building after the expiration of the permit. The defendant would not have been required to do any affirmative act

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declaring a forfeiture, even if it had known of the acts of the plaintiff. Johnson v. American Ins. Co., 41 Minn. 396, 43 N. W. 59.

As bearing upon this question of waiver, the plaintiff offered in evidence certain letters written by defendant's general agent to her attorney after the loss, which the court excluded. We have examined these, and fail to find anything in them tending in the slightest degree to prove a waiver of the forfeiture. On the contrary, while in some of them objection is made to the proof of loss presented by the plaintiff, the general agent in every one of the letters expressly denied any liability on the part of his company on the policy on the ground that it had become void on account of the storage of the fireworks in the building. The terms of the permit were clear and unambiguous. There was no claim of fraud or mistake. Hence the evidence offered to prove that it was intended to cover a longer period was too evidently incompetent to require discussion.

The request to reopen the case, after both parties had rested, in order to permit the plaintiff to introduce additional testimony, was, under the circumstances, addressed to the discretion of the court. Moreover, the proposed additional evidence was immaterial. The mere knowledge of defendant's agent that the fireworks were still stored in the building after the permit had expired would not of itself amount to a waiver, for a reason already suggested. This covers all the points in the case worthy of notice.

Order affirmed.

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MARCELLUS L. COUNTRYMAN v. GEORGE A. WASSON.

December 4, 1899.

Nos. 11,833—(114).

Entry of Tax Judgment—G. S. 1894, § 1585.

The provision of G. S. 1894, § 1585, that a tax judgment shall be entered wholly upon the left-hand page of the judgment book, is merely directory, and noncompliance with it does not affect the validity of the judgment.

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Notice of Expiration of Redemption.

A finding of the court considered, and *held* to constitute a finding of a valid notice of expiration of the time for redemption of land from a tax sale.

Tax Sale—Lien of State for Prior Taxes.

Where land has been bid in for the state at a tax sale, and has not been redeemed, or the interest of the state assigned, the state may obtain a tax judgment and sell the land for the taxes for subsequent years; and under such circumstances the sale will not extinguish the lien of the state for the prior taxes for which it was bid in.

Action in the district court for Traverse county by plaintiff as receiver of Frederick T. Day, insolvent, to determine adverse claims. The case was tried before C. L. Brown, J., who found in favor of defendant; and from a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

F. W. Murphy and *S. & O. Kipp*, for appellant.

If the interpretation of the statute is as defendant contends, the purchaser at a subsequent tax sale without redemption would take a title which would cut out the claims of the state on a prior sale at which it had bid in the land. Berglund v. Graves, 72 Minn. 148. That this is the rule, and that it applies as well to prior tax liens held by the state as to those held by individuals, where there is no statute to the contrary, is settled. 25 Am. & Eng. Enc. 277; Irwin v. Trego, 22 Pa. St. 368, 375; Lessee of Buckley v. Osburn, 8 Ohio, 181; Dougherty v. Henarie, 47 Cal. 9; Brewer v. District of Columbia, 5 Mackey (D. C.) 274, 280; Burrell, Taxn. 347, 348; 2 Desty, Taxn. 849. See Opinions Atty. Gen. 350, 534.

A. S. Crossfield and *S. A. Flaherty*, for respondent.

MITCHELL, J.[1]

Action to determine adverse claims to real estate.

The plaintiff holds the patent title, and is the owner of the land, unless his title has been extinguished by the tax titles under which the defendant claims. The defendant holds and claims under three tax titles, to wit: (1) An absolute tax deed from the state, dated

[1] BROWN, J., having tried the case in the court below, took no part.

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July 8, 1895, of the land as forfeited for the taxes of 1890, for which it was bid in for the state at the annual tax sale in May, 1892; (2) a tax certificate to an actual purchaser for taxes of 1891 at the annual tax sale in May, 1893; (3) a tax assignment certificate dated May, 1894, the land having been bid in for the state at the annual tax sale that year for the taxes of 1892. It was upon the last of these tax titles that the trial court held in favor of the defendant, and, if this title is valid, it will be unnecessary to consider the other two.

1. The plaintiff claims that the tax judgment was invalid because it was entered upon both the right and left hand pages of the judgment book, and was not entered wholly upon the left-hand page, as required by G. S. 1894, § 1585. This provision was not intended for the protection of taxpayers, but merely to promote an orderly and convenient style of keeping tax-judgment books, so that there might be ample room on the right-hand pages for making subsequent entries. It is therefore not mandatory, but merely directory, and noncompliance with it does not render the judgment invalid.

2. The finding of the court as to the notice of the expiration of the time of redemption is that the county auditor issued a notice which duly recited said tax judgment and sale, and said assignments from the state to said Scheifley [defendant's grantor], and duly stated the amount required to redeem said land [describing it] from said assignment sale from the state to said Scheifley, exclusive of costs to accrue upon said notice, and when the time of such redemption would expire, and that said notice complied in all respects with the provisions and requirements of law with respect to notices of expiration of redemption from tax sales.

It is urged that this notice, as thus found by the court, was insufficient because it did not specify either the amount for which it was bid in for the state, or the amount paid by Scheifley for the state assignment certificate. It is also urged that the general finding that the notice in all respects complied with the law is to be considered as a mere legal conclusion from the facts specifically found as to the contents of the notice. We do not think the rule invoked is applicable. It would perhaps have been better form

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had the trial court either specifically found all the statements which the notice did contain, or merely found generally that the notice in all respects complied with the law. The latter would have been sufficient, at least in the absence of a request for a more specific finding. This general statement is made as an additional finding, and not as a legal conclusion from what preceded.

3. The principal and most important objection urged against these judgments and sales for the taxes of 1891 and 1892 is that where land has been bid in for the state, and has not been redeemed, and the state has not assigned or conveyed its interests, but still holds its lien upon the land, a judgment or sale of the land for subsequent taxes is unauthorized; that such taxes should be merely levied, and allowed to remain delinquent, to be collected as part of the amount which a redemptioner or purchaser from the state would have to pay. The statute (section 1600) merely provides that

"The taxes for subsequent years shall be levied on property so sold or bid in for the state, in the same manner as though the sale had not been made."

It nowhere in express terms either directs or prohibits a judgment and sale for such taxes while the land remains "bid in for the state" for a prior tax. Hence the question must be determined by a consideration of the general policy of our tax law, viewed in the light of the practical results which would follow from the adoption of one or the other of the two proposed modes of procedure.

This court has held that under such circumstances the state is not obliged to obtain a tax judgment and sell the land in order to protect and enforce its lien for subsequent taxes; but the question whether it may do so was not decided. Berglund v. Graves, 72 Minn. 148, 75 N. W. 118. The usual practice in this state has been not only to levy subsequent taxes on land previously bid in for the state, but also to obtain judgment and sell the lands. To hold now that such sales are invalid would result in avoiding many titles. On the other hand, to hold that the state may make such sales would greatly aid it in enforcing payment of taxes. If, where land is bid in for the state, there can be no sale for subsequent taxes until the land is redeemed, or the state has assigned its interest, fre-

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quently taxpayers, if they discovered that the sale at which the land was bid in for the state was invalid, would lie still for years, until perhaps part of the taxes were barred by the statute of limitations, whereas they would not venture to assume the risk of being able to prove all of a number of sales invalid.

The strongest point urged against the policy of permitting the state to make successive sales for subsequent taxes is that they would extinguish the lien of the state for the prior tax for which the land had been bid in. If this is so, it would undoubtedly be a strong reason for holding that the legislature never contemplated any sales under such circumstances. But we do not think a subsequent sale would have any such effect. Under our revenue law undoubtedly a sale for taxes extinguishes all prior titles, including tax titles, of every one except the state. It is frequently laid down in the authorities, without qualification, that the sale of land for delinquent taxes for one year destroys the lien of all unpaid taxes for previous years. But, when the facts in those cases are examined, it will be found, with practically no exception, that they are divisible into two classes, viz.: (1) Where there were two sales to actual purchasers, and the purchaser at the sale for the prior tax should have protected his purchase against subsequent taxes; (2) where the state should have sold the land for all delinquent taxes, but omitted some, and subsequently attempted to sell the land for the omitted tax. The present case does not fall within either class. There was no actual sale for the tax of 1890. After the land was bid in for the state, it had merely what it had before, to wit, a lien for the tax. The bidding in for the state was merely one of the steps convenient for the subsequent enforcement of this lien. When the state levied taxes for subsequent years, it was not taxing its own interest in the land, but merely the interest of the delinquent taxpayers, and when it sold the land for the tax that interest was all it sold. See Mayor v. Cowan, 10 Lea, 209, 78 Tenn. 209. For these reasons, we are of opinion that a sale for subsequent taxes under the state of facts existing in this case would not extinguish the lien of the state for prior taxes. Our conclusion is that the sale of this land in 1894 for the taxes of 1892 was valid.

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This disposes of all the questions raised as to the validity of that sale, and it therefore becomes unnecessary to consider either of the others.

Judgment affirmed.

The following opinion was filed December 19, 1899:

MITCHELL, J.

The questions whether our statute authorizes a tax judgment and tax sale for a junior tax where the land has been bid in for the state for a senior tax, and the land has not been redeemed or the interest of the state assigned, and, if so, whether the sale for the junior tax will extinguish the lien of the state for the senior tax, are, in my judgment, so doubtful and so important (involving, as they do, the general policy of our revenue system), and were so briefly discussed by counsel, that I think further argument should be permitted. But, in accordance with the views of the court, the application for a reargument is hereby denied.

JAMES B. CONE v. CHARLES A. NIMOCKS and Another.

December 4, 1899.

Nos. 11,924—(142).

Forms of Acknowledgment.

The provisions of Laws 1883, c. 99 (G. S. 1894, §§ 5650, 5651), as to forms of acknowledgment authorized by section 1, are merely permissible, and not mandatory; any form previously good is still sufficient.

Assignment of Mortgage by Executor—Record of Copy of Letters.

The assignee of an executor, appointed in another state, of a mortgagee of lands in this state, containing a power of sale to the mortgagee, his heirs, executors, administrators, and assigns, may exercise the power without first filing in the office of the register of deeds of the county where the foreclosure is to be commenced an authenticated copy of the appointment of his assignor as executor. He had that power in the absence of any statute, and the proviso to G. S. 1894, § 6053, does not apply; that section being, by its plain language, limited to the exercise of the power by the executor himself.

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Action by plaintiff as trustee of W. R. C. Corson and another under the will of William R. Cone, deceased, to recover possession of land after foreclosure. The action was commenced in the municipal court of Minneapolis, but because the title of real estate was involved was by stipulation removed to the district court for Hennepin county. The case was tried before Brooks, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendants appealed. Affirmed.

Taylor & Edwards, for appellants.

The certificates of acknowledgment are insufficient for failure to comply substantially with the prescribed form, since it does not appear from them alone or when read in connection with the instruments that the person whose acknowledgment was taken was known to the officer to be the person described in and who acknowledged the instruments. Miller v. Link, 2 N. Y. Sup. Ct. 86; Wolf v. Fogarty, 6 Cal. 224; Tully v. Davis, 30 Ill. 103; Black v. Aman, 6 Mackey, 131. The assignee of a foreign executor cannot foreclose by advertisement without first recording the evidence of his appointment. Holcombe v. Richards, 38 Minn. 38; Sutherland, St. Const. § 326.

Stevens, O'Brien, Cole & Albrecht, for respondent.

The acknowledgments are sufficient. Hunt v. Johnson, 19 N. Y. 279, 293; Hiles v. LaFlesh, 59 Wis. 465; Carpenter v. Dexter, 8 Wall. 513; 1 Devlin, Deeds, §§ 464, 510, 514, 520; Wells v. Atkinson, 24 Minn. 161; Bigelow v. Livingston, 28 Minn. 57; Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58.

It was not a prerequisite that an exemplified copy of the authority should be filed. The only requisite to foreclosure which is pertinent is found in G. S. 1894, § 6029. Had the legislature intended that the authority of an assignee must be recorded, it would have so provided, as in case of foreclosure directly by foreign executors, in section 6053. See Backus v. Burke, 48 Minn. 260. The construction contended for by defendants would be in derogation of the common law, and will not be applied unless the language prohibits any other reasonable construction. Full force can be given to sec-

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tions 4715–4717 without holding that they operate as an implied amendment of chapter 81. At common law, the authority of an executor to assign a mortgage follows as a right and function of his office, and the assignment, being good at the place of his appointment, is good everywhere, unless a statute expressly provides to the contrary 1 Jones, Mort. § 797. The statute simply dispenses with other proof than a certified copy of the letters. The right to assign is incident to possession of the legal title. Daby v. Ericsson, 45 N. Y. 786, 790; Johnson v. Wallis, 112 N. Y. 230, 233; In re Cape May, 51 N. J. L. 78; Lucas v. Byrne, 35 Md. 485, 494. The disability of a foreign executor to sue does not attach to the subject-matter, but to the person of the plaintiff. His assignee may maintain an action to foreclose. Wiltsie, Mort. Forec. § 27. See Wilkins v. Ellett, 9 Wall. 740, 108 U. S. 256; Petersen v. Chemical, 32 N. Y. 21; Matter of Butler, 38 N. Y. 397; Putnam v. Pitney, 45 Minn. 242; Luce v. Manchester, 63 N. H. 588.

MITCHELL, J.

For the purposes of this appeal, the following statement of facts, according to their legal effect, is sufficient: An executor appointed in the state of Connecticut, the domicile of his testator, assigned a mortgage belonging to the estate of the latter, which contained the usual power of sale, to the mortgagee, his heirs, executors, administrators, and assigns. The certificate of acknowledgment of the assignment was in the following form:

"Personally appeared [the name of the executor], executor of the will of [name of the testator], late of Hartford, deceased, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed as such executor, before me.

Alfred Spencer, Jr.,
[Notarial Seal.] Notary Public."

The assignee, in the exercise of the power, sold the premises, and at the sale he himself became the purchaser. No authenticated copy of the executor's appointment as executor was filed for record in the office of the register of deeds of the county in which the foreclosure was commenced and in which the land was situated. The time of redemption from the sale having expired, and no redemp-

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tion having been made, the plaintiff, who was the purchaser at the sale, commenced this action to recover possession of the premises from the defendants, who hold under a title subordinate to the lien of the mortgage. They insist that the foreclosure was void on two grounds: (1) That the certificate of acknowledgment of the assignment was insufficient to entitle the instrument to record; and (2) that plaintiff had no authority to exercise the power of sale without first filing for record in the office of register of deeds of the county an authenticated copy of his assignor's appointment as executor.

1. The certificate of acknowledgment would have been sufficient prior to the passage of Laws 1883, c. 99 (G. S. 1894, §§ 5650, 5651). The notary's knowledge of the identity of the person appearing before him with the person who executed the instrument is implied by his certificate that it was executed by the executor of the will of the testator. Brunswick-Balke-Collender Co. v. Brackett, 37 Minn. 58, 33 N. W. 214. The act of 1883, at least as to acknowledgments falling under the first section, is merely permissive, and not mandatory. Any form of acknowledgment which would have been good previously is still sufficient. The act has no repealing clause. It starts out by providing that the following forms may be used, and in the second section refers back to them as "the forms above sanctioned."

2. The second question is whether the filing of an exemplified copy of the appointment of the executor assignor was a prerequisite to the right of his assignee to exercise the power of sale. Laws 1876, c. 41 (G. S. 1894, § 6053), provides that

"Any executor or administrator duly appointed in any other state or county may foreclose by advertisement any mortgage of land in this state, belonging to the estate represented by him, in the same manner, and under like restrictions, as a resident, appointed in this state, may do: provided, that before commencing any such foreclosure, an authenticated copy of his appointment as such executor or administrator is filed for record in the office of the register of deeds of the county in which such foreclosure is to be commenced."

The legislature apparently assumed that an executor or administrator appointed in another state or county had no authority to

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exercise a power of sale in a mortgage on lands in this state, and passed the act for the purpose of removing this disability, subject only to the one condition precedent specified in the act. In fact, they already had this power, under the agreement of the parties to the mortgage. Consequently, instead of relieving foreign executors and administrators of an existing disability, the effect of the act was to impose upon them a new condition precedent to the exercise of the power. Holcombe v. Richards, 38 Minn. 38, 35 N. W. 714. These considerations may have some bearing upon the construction of this section. Undoubtedly, this proviso was intended for the protection of mortgagors and purchasers by requiring record evidence that the person exercising the power was in fact executor or administrator. It may also be admitted that, where the power is exercised by an assignee of a foreign executor or administrator, substantially the same reasons exist for requiring that there be record evidence that the person who executed the assignment was what he purported and professed to be, to wit, the personal representative of the deceased mortgagee. Such a case, however, is not within the letter of the statute, and the question is whether there is any rule of construction by which it can be included.

The cardinal rule of construction is to ascertain the intention of the legislature. But this must be ascertained from the language of the statute. If this language is plain and unambiguous, the legislature must be intended to mean what they have plainly expressed, and consequently no room is left for construction. There is no ambiguity of language here. By its clear and plain language, this proviso applies only to the exercise of the power by the executor or administrator. The mere fact that there existed the same reasons for applying the same condition to the exercise of the power by an assignee of the executor or administrator will not justify a court in including such a case within the statute when, according to its plain and unequivocal language, the legislature has omitted it. The suggestion that the executor could not give his assignee any greater rights than he himself possessed is, in our judgment, without force. That is true as to rights of property in the mortgage, but it is not necessarily true as to the right to exercise the power

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of sale, unless the statute makes it so. For example, at common law, a foreign executor could not sue in another jurisdiction upon a promissory note or other chose in action, but his assignee could. See Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41. Independently of this statute, the assignee of this mortgage had, under the convention of the parties, the right to exercise the power of sale. The proviso attached to section 6053 does not include or apply to such a case, and therefore, in our opinion, the power was lawfully exercised.

Defendants' counsel, in support of their contention, also cite G. S. 1894, §§ 4715, 4716. There is nothing in these sections at all bearing upon the question under consideration. They apply to domestic as well as foreign executors and administrators. To give them any application to this case, it would be necessary to construe section 4716 as meaning that no assignment of a mortgage by either a foreign or domestic executor or administrator is valid, unless an exemplified copy of his letters testamentary or of administration had been previously filed in the county in which the mortgaged premises were situated. No such construction has ever been suggested or dreamed of by any one. The sole purpose of this section is to provide a method of securing, in the county where the land is situated, a perfect record chain of title, upon which parties dealing with property may rely, and which will furnish convenient evidence of their title.

Judgment affirmed.

CANTY, J.

I concur in that part of the opinion which holds that the acknowledgment is sufficient. But I cannot concur in that part which holds that although under G. S. 1894, § 6053, a foreign executor or administrator must record an authenticated copy of his appointment in the office of register of deeds before he can foreclose by advertisement a mortgage of land in this state, his assignee may foreclose without filing such copy.

As admitted in the foregoing opinion, a foreign executor or administrator had, before the enactment of this section, a right to

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foreclose, under the power of sale, a mortgage in this state. Then, the only purpose for which the legislature could have passed section 6053 was that of compelling such executor or administrator to put on record his ownership of the mortgage and his right to exercise the power, so as to furnish evidence thereof, and complete the chain of record title. This was a good and sufficient purpose, and this court has no right, in order to avoid this conclusion, to speculate or suppose that the legislature blundered or was laboring under a mistake when it passed this section. This purpose of the legislature is clearly in line with its purpose in enacting other parts of the statute. For instance, section 6029 prescribes, as a condition precedent to the foreclosure of a mortgage under the power of sale, that the mortgage has been recorded, "and, if it has been assigned, that all the assignments thereof have been recorded." After the holder of the mortgage dies, there is a transfer of it to his executor or administrator by operation of law, and, by section 6053, the legislature intended to require evidence of this to be put on record in the form of an authenticated copy of the appointment. If such was the purpose of the statute, the executor or administrator cannot assign any greater right than he himself possessed, and, if his right to foreclose was conditioned on his recordng an authenticated copy of his appointment, he must assign that right burdened with that condition. It is true that at common law a foreign executor or administrator was disqualified from maintaining, in his official capacity, a suit in the courts of any state, while his assignee was not. But that case bears no analogy to this. There it was a mere personal disqualification, which extended only to the foreign representative, not to his assignee. Here the purpose of the legislature was not to disqualify any one in particular, but to require record evidence of the right to foreclose the mortgage

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UNION BANK OF ST. PAUL v. HORACE P. RUGG and Another.

December 7, 1899.

Nos. 11,745—(99).

Assignment for Benefit of Creditors—Laws 1895, c. 67—Waiver.

The insolvents herein, on and prior to April 24, 1895, were indebted to the appellant in the sum of $650 upon two promissory notes. On May 20, 1895, they made an assignment for the benefit of their creditors, which was in form and substance an assignment under the general insolvency law of the state as it was prior to the approval on April 24, 1895, of Laws 1895, c. 67, purporting to provide for the discharge of debtors whether creditors filed releases or not. The assignment made no reference to the act of 1895, but, on the contrary, it expressly provided that the trust estate was for the benefit only of creditors who released their claims. The appellant made proof of its claim, but filed no release thereof. Afterwards, and on June 30, 1898, one of the insolvents petitioned the district court for a discharge from all his debts pursuant to the act of 1895, and such proceedings were had that the court made its order granting him a discharge from all his debts held by the creditors named in the order, including appellant, and distributing the trust estate as provided in such act. *Held*, that the appellant did not, under the special facts of this case, waive, by the mere proof of its claim, its constitutional right as to the impairment of the obligation of its contract, and that the order was erroneous as to it.

In the matter of the assignment of Horace P. Rugg and another, insolvents, pending in the district court for Ramsey county, the Union Bank of St. Paul appealed from an order, Brill, J., directing that the assets of the insolvents be distributed among the creditors who filed claims, that certain real estate claimed by said Rugg as homestead be set apart free from claims of his creditors, and granting a discharge from his debts as against certain creditors including the bank. Reversed as to appellant.

Stevens, O'Brien, Cole & Albrecht, for appellant.

The act of 1895 is void by reason of uncertainty, ambiguity, and irreconcilable conflict with the act of 1881. The act of 1895 is void because it provides for a personal judgment against residents of the state without personal service. Baldwin v. Hale, 1 Wall. 223,

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233; Davis v. Board of Co. Commrs., 65 Minn. 310. See Pennoyer v. Neff, 95 U. S. 714; Arndt v. Griggs, 134 U. S. 316; Shepherd v. Ware, 46 Minn. 174; Smith v. Hurd, 50 Minn. 503; Bardwell v. Collins, 44 Minn. 97; Whalley v. Eldridge, 24 Minn. 358; Carson v. Cochran, 52 Minn. 67; Jewett v. Iowa Land Co., 64 Minn. 531.

The act, if otherwise valid, cannot constitutionally be applied to a contract made before its passage. By its terms it applies as well to contracts existing before as to those created after its passage, and provides for a discharge of claims of creditors who have not appeared. Walker v. Whitehead, 16 Wall. 314; Barnitz v. Beverly, 163 U. S. 118; Van Hoffman v. City of Quincy, 4 Wall. 535, 552; Planters Bank v. Sharp, 6 How. 301. Congress alone can pass a bankruptcy act which shall impair the obligation of contracts. If the act was ever valid, it was repealed by the act of 1897, before the application in question was made, and the proviso does not include it. It is not enough to authorize a discharge that the creditor has appeared in the anterior insolvency proceedings. Such appearance must be clearly a submission to the jurisdiction in the discharge proceedings. 1 Rose's Notes on U. S. Reports, 528, and cases cited.

Warner, Richardson & Lawrence, for respondent.

The terms and provisions of the act of 1895 are to be read into the assignment. The bank elected to become a party to the proceedings by proving its claim, and therefore waived its right to contend that the law did not affect it. Lambert v. Scandinavian-Am. Bank, 66 Minn. 185; Gilman v. Lockwood, 4 Wall. 409. The law was modeled after Sanborn & B. Ann. St. c. 179, which has been in force in Wisconsin since 1849, and was borrowed from New York, and has always been sustained in those states. Even if unconstitutional as to the claim of the bank, had it not appeared, it would not follow that the act was void in toto. See State v. Kinsella, 14 Minn. 395 (524); City of Duluth v. Krupp, 46 Minn. 435. The act no more impairs the obligation of contracts than did that of 1881, for it was not the release which under the act of 1881 discharged

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the debtor, but the judgment of discharge to which the release gave consent. National German-Am. Bank v. Wilder, 35 Minn. 94.

It does not make the law unconstitutional that the legislature provides that notice shall be served in the same manner as a summons or in such manner as the court may determine, for it cannot be presumed that the court will determine an improper service. But in bankruptcy matters service by publication and mailing is proper. McNamara v. Casserly, 61 Minn. 335, 344. The act was recognized as constitutional with reference to subsequent debts in Lambert v. Scandinavian-Am. Bank, supra, and the law laid down in Wendell v. Lebon, 30 Minn. 234, was applied, that a creditor belonging to the excepted class, making himself a party to the proceeding, cannot object that he comes within the excepted class. See Cooley, Const. Lim. (4th Ed.) 360; Davidson v. Smith, 1 Biss. 346, Fed. Cas. No. 3608; Clay v. Smith, 3 Pet. 411; Baldwin v. Hale, 1 Wall. 223; Gilman v. Lockwood, supra. The appeal should be dismissed because not made within six months of entry of judgment.

START, C. J.

The insolvents herein, on and prior to April 24, 1895, were indebted to the Union Bank of St. Paul, hereinafter called the "Bank," in the sum of $650 and interest upon two promissory notes executed by them to it, and on May 20, 1895, they executed and filed in the district court of the county of Ramsey an assignment for the benefit of their creditors. The assignment did not, in terms, refer to the insolvency law (Laws 1881, c. 148), nor to Laws 1895, c. 67, approved April 24, 1895, purporting to provide for the discharge of insolvent debtors from their debts whether creditors filed releases or not. But it was, in form and substance, an assignment under the insolvency laws of the state as they existed prior to the approval of such act, and expressly provided that the residue of the trust estate, after the payment of expenses, should be paid to such creditors "who shall file releases of their debts and claims" against the assignors. The bank, on June 8, 1895, made proof of its claim as evidenced by the promissory notes, but did not file any release thereof, and it does not appear from the record that it in any other manner appeared or took part in the insolvency proceedings. Nor

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does it appear that the insolvents, or either of them, ever filed any notice of any election or intention to claim a discharge from their debts under the act of 1895.

On June 30, 1898, one of the insolvents, Horace P. Rugg, presented his petition to the court to set apart to him certain real property as exempt, and to discharge and release him pursuant to such act. A citation or order to show cause was thereupon issued, which was personally served upon the bank, and such proceedings were thereafter had that the court, on September 21, 1898, made its order setting apart to him the exempt real estate, and granting him a discharge from all his debts held by or owing to all of his creditors named in the order, of whom the bank was one, and directing the clerk to enter judgment against him in favor of each creditor therein named for the amount of their respective claims, and then to forthwith enter a satisfaction of such judgments. On June 5, 1899, the bank appealed.

1. The respondent insists that the appeal must be dismissed for the alleged reason that the determination of the court was in form and effect a judgment from which an appeal can only be taken within six months after its entry, and not an order, as assumed by the bank, from which an appeal may be taken within thirty days after notice thereof. It is not claimed that such notice was ever given; hence the only question is whether the granting of the discharge was, in legal effect, a judgment or an order. If it is the latter, the appeal cannot be dismissed. In the case of Lambert v. Scandinavian-Am. Bank, 66 Minn. 185, 68 N. W. 834, the action of the court denying the debtor's application for a discharge was appealed from as an order, and treated as such by this court; no claim to the contrary having been made. Sections 22, 23, 24, and 26 of the statute in question designate the action of the court granting the debtor the discharge as an order, and provide for an appeal therefrom. We hold that it is an order, and that the appeal therefrom was taken in time.

2. The bank claims that the act of 1895 is unconstitutional in so far as it provides for the discharge of insolvent debtors from debts contracted prior to its passage; hence the court had no power to

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make an order discharging the respondent for liability for his debt to the bank.

It is the law that state insolvent laws which assume to discharge contracts made antecedently are unconstitutional, but a creditor may waive his right to insist on the invalidity of such a law as to him. Wendell v. Lebon, 30 Minn. 234, 15 N. W. 109; Lambert v. Scandinavian-Am. Bank, supra. It being admitted in this case that the bank's debt was contracted prior to the approval of the act of 1895, it follows that the order appealed from is erroneous as to the bank unless it has waived its right. The respondent insists that it has, because it made proof of its claim in the general insolvency proceedings. He does not claim that the bank ever took any other part in the proceedings, or released its claim, or received any benefit from the trust estate, or did any other act implying such waiver except to prove its debt. His claim is this:

"The assignment in this case was made after the passage of the law of 1895. The terms and provisions of that law are read into the assignment. With the law of 1895 in force, and forming a part of the assignment, the appellant, the Union Bank, elected to become a party to the proceeding, by proving its claim. It therefore waived its rights to claim that the law did not affect it."

The case of Lambert v. Bank is relied upon in support of this proposition. In the case cited the insolvent debtor applied for his discharge under the act of 1895, and the trial court made its order denying his application as to debts contracted antecedently, from which he appealed. His contention was that by appearing to oppose his discharge, and proving when their debts were contracted, the creditors waived their rights. This court held that a creditor did not, by appearing for the purpose of asserting a constitutional right, thereby waive it; that to construe the statute as claimed would make it simply a trap for such a creditor, cunningly devised to deprive him of his constitutional rights. The question whether the mere proof by the debtor of his claim in the general insolvency proceedings was a waiver of the creditor's rights was not before the court nor decided. It was, however, stated in the opinion that it was in the general insolvency proceedings only that filing an

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affidavit, or making proof of claim, or receiving a dividend, or a participation in the proceedings was a waiver of the creditor's rights. This was not a decision as to the constitutionality of the statute, but as to its construction. We held that the provisions of the statute to the effect that making proof of claim, or receiving a dividend, or appearance in the proceedings referred to the general insolvency proceedings, and not to the proceedings to secure the debtor's discharge; otherwise, the statute would be simply a trap.

The question whether the bank in this case waived, by filing proof of its claim, its right to insist that the act of 1895 was unconstitutional as to its debt, and that, therefore, the order of the court discharging the debtor from all liability therefor is erroneous, is an open one. An answer to this question involves a construction of the act in question. The last section of this act is in these words:

"Sec. 27. This act shall not be construed to change nor to prohibit the proceedings and discharge of the insolvent provided for in said chapter 148, General Laws of 1881, nor to repeal the same, nor in any way to affect such proceedings, but shall be held and construed to furnish and provide an additional remedy and relief only upon compliance of said insolvent with the provisions of this act, initiated by the petition or application of said insolvent as aforesaid."

Many of the provisions of the act of 1895 are so radically inconsistent with those of the general insolvency law of 1881 as to present a case for election of remedies by the insolvent debtor. Under the former act the trust estate is to be distributed to all creditors in whose favor judgment is entered and satisfied, whether they file releases or not. See Id. § 24. Under the latter the assignment is for the benefit only of creditors who file releases, and the estate is distributed to them only. G. S. 1894, §§ 4240, 4249. The debtor, under the former act, as a condition precedent to his discharge, must take an oath of innocence, and swear that he has not within six years in any manner disposed of any of his estate for the benefit of himself or family, or to defraud any creditor. Laws 1895, § 15. But under the latter he must have disposed of his property with such intent within six months prior to his assignment in order to defeat his discharge for such cause. G. S. 1894, § 4249. A

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debtor might well be in a position to secure his discharge under the general insolvency law when he would not be under the act of 1895, and a creditor is entitled to know under which act the debtor will claim a discharge before he files his proof of claim. And where, as in this case, the debtor makes an assignment for the benefit of such of his creditors only as file releases in accordance with the general insolvency law, with no hint that he will claim a discharge, and have the estate distributed under the act of 1895, a creditor has a right to assume that the debtor has elected to claim his discharge, and have his estate distributed under the general insolvency law alone.

The mere filing of proof of his claim by a creditor in accordance with the law as it stood prior to the act of 1895 was not a waiver of any of his rights, for it was only when he filed a release of his claim as provided by law that the debtor acquired a right to a discharge from liability on account of the debt. It was and is the practice, sanctioned by the courts, for creditors under the general insolvency law to prove their claims, and then wait to see what the probable dividend on their claims will be, before deciding whether they will release their claims or not. If they finally decide not to do so, they are thereafter as strangers to the insolvency proceedings, and the debtor cannot secure a discharge as to their claims. Now, to construe the act of 1895 so as to permit a debtor to make his assignment for the benefit of creditors only who release their claims, and thereby induce them to file proof of their claims simply as a preliminary step to a future determination whether they will comply with the terms of the assignment, and release their claims, and then permit the debtor to apply and receive his discharge under the act of 1895, on the ground that the filing of proof of the claims is a waiver of the constitutional rights of such creditors, would render it unconstitutional. Such a statute would be, as was said in Lambert v. Scandinavian-Am. Bank, simply a trap, cunningly devised to deprive creditors of their constitutional rights. It would enable the debtor to set the trap by making an assignment strictly under the insolvency law, as it was before the passage of the act of 1895, for the benefit of creditors who filed releases of their claims,

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and then, after a creditor, in reliance upon the assignment, had filed, but not released, his claim, spring the trap by applying for and securing his discharge under the act of 1895, on the ground that the creditor, by filing his claim, waived his rights, and consented that the court might cancel the obligation of his contract.

We must, then, seek some other construction of this statute, or declare it unconstitutional. If the statute is to be construed as applying only to cases where the debtor, by his assignment, or by an instrument filed before creditors file proofs of their debts, declares that it is his intention to claim a discharge and a distribution of his estate under the act of 1895, we are of the opinion that the act would be constitutional, otherwise not. In such a case the creditor is bound to know the law, and is informed by the records in the insolvency proceedings of the debtor's intention, and acts advisedly in making proof of his claim, and must be held to waive his constitutional right to object to the debtor's discharge. We therefore hold that, to enable an insolvent debtor to claim the benefits of Laws 1895, c. 67, he must have declared his intention to do so in his assignment for the benefit of his creditors, or by an instrument filed before creditors made proofs of their claims. The insolvent in this case did neither. Therefore the bank did not, by filing proof of its debt, waive its constitutional rights, and thereby consent that the court might make an order discharging the insolvent from the obligation of its contract.

The order as to the bank is at least erroneous, and must be reversed as to it. So ordered.

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WILLIAM G. WHITE v. PETER J. ESCH and Another.

December 7, 1899.

Nos. 11,753—(126).

Attorney at Law—Verdict Sustained by Evidence.

This is an action to recover pay for the services of the plaintiff as an attorney claimed to have been rendered to the defendants. *Held*, that the evidence sustains the verdict, and that the trial court did not err in its rulings as to the admission of evidence or in its charge to the jury.

Action in the municipal court of St. Paul to recover $250 for professional services. The case was tried before Orr, J., and a jury, which rendered a verdict in favor of defendants; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

William G. White, pro se.

Humphrey Barton, for respondents.

START, C. J.

Action to recover $250 from the defendants for services rendered to them by the plaintiff as a lawyer in two certain actions in the district court of the county of Ramsey. In one of the actions the Farmers' National Bank of Owatonna was the plaintiff, and C. W. Burdick and these defendants were defendants. The action was upon an appeal bond in an action by the bank against Burdick to foreclose a mortgage executed by Burdick as principal and these defendants as sureties. The other action was by the bank against these defendants upon an undertaking given by them upon another appeal by Burdick in the foreclosure actions. Both actions involved the same general subject, and were tried together, and in the original action in which the appeal bond and undertaking were given the plaintiff herein acted as attorney for Burdick. The defendants denied that the plaintiff was ever employed or rendered for them the services alleged. The jury returned a verdict for the defendants, and the plaintiff appealed from an order denying his motion for a new trial.

1. The first and second assignments of error relate to the instruc-

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tions by the trial court to the jury. The second cannot be considered, as the part of the charge upon which it is based was not excepted to. The first error assigned is that the court erred in charging the jury as follows:

"Mr. Bell, by virtue of his relation as attorney for the defendants, possessed no authority to employ another counsel or associate attorney at the expense of his clients. Such authority must be expressly conferred before it can be exercised by an attorney."

If there was no evidence in the case which would justify the jury in finding an implied contract of employment of the plaintiff by the defendants, this instruction was correct; otherwise not.

It is undisputed that the defendants retained Mr. Bell, a lawyer, to represent them in the action. He testified to the effect that he told the defendants, or at least one of them (Mr. Jacob Esch), that it was necessary and desirable to get Mr. White to help in the defense, and that the defendant consented to leave the matter with him. He further testified that he requested Mr. White to act with him as associate counsel; that the plaintiff did so; and that he afterwards told one of the defendants that Mr. White was helping in the case. The plaintiff also testified to his employment by Mr. Bell. The testimony on the part of the plaintiff further tended to show that the plaintiff and Mr. Bell appeared in court together, and both acted as counsel for the defendants, and that one or the other of the defendants was present at different times during the progress of the trials. The evidence on the part of the defendants was a direct contradiction of the testimony of Mr. Bell. The defendant Jacob Esch testified, in effect, that he never authorized the employment of the plaintiff, and was never informed that he had been employed for the defendants, and that the first that he knew of any such claim being made was when the summons was served in this action. The evidence was undisputed that the plaintiff appeared in the action on the bond for the defendant Burdick at the request of Mr. Bell, and that the defendants knew that he appeared for Mr. Burdick, but there is no evidence that they knew the fact that it was at Mr. Bell's request. The evidence was sufficient, if satisfactory to the jury, to have sustained a finding that there was an express con-

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tract for the employment of the plaintiff as claimed, but the jury found otherwise.

If there was no express contract, was the evidence sufficient to sustain a verdict that there was an implied contract of employment of the plaintiff by defendants? We are of the opinion that there was not. The plaintiff urges that from the fact that the plaintiff appeared in court with the counsel of record for the defendants, and that they together conducted the defense to the knowledge of the defendants, who made no objections thereto, the jury would have been justified in inferring a promise to pay for the plaintiff's services. But the record shows that the plaintiff appeared for their co-defendant Burdick, which fact they actually knew, and, in view of the history of the litigation out of which the actions upon the bond and undertaking grew, and the relation of White and Burdick thereto, and the obligation of the latter to indemnify the defendants, the evidence does not justify the conclusion that they knew, or ought to have known, that White was defending such actions for them and on their credit.

2. On the cross-examination of the plaintiff, his attention was called to the answer of C. W. Burdick in the case of the bank against Burdick and the defendants herein. He admitted that it was the answer in one of the actions in which he claimed pay for his services to the defendants; also that he signed and verified the answer as Burdick's attorney. The answer was then received in evidence, over his objection. The ruling of the court is the basis of the third assignment of error. The ruling was correct, for the answer was competent and material, on cross-examination of the plaintiff, as tending to show that his appearance for Burdick was not merely nominal, but that the latter had, or claimed to have, substantial interests to protect by the appearance of the plaintiff as his attorney.

3. On the cross-examination of Attorney Bell, he was shown a letter which he admits he wrote and sent to the defendants, and inclosed with it copies of two letters written by him to Burdick. The letter and the two copies were received in evidence, over the plaintiff's objections. The ruling is assigned as error. The letter in-

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formed the defendants that Mr. White had argued the case on demurrer for Mr. Burdick, and he (Mr. Bell) for these defendants; that the demurrers were overruled; and that Mr. White said he was going to appeal for Burdick. This letter was properly received, as a part of the cross-examination, for the consideration of the jury, in connection with Bell's evidence that he employed White, and that he acted for the defendants.

Separate objections were interposed to the admission of the copies of the two letters to Burdick sent with the letter to the defendants. The fact that they were copies is not significant; for, if Mr. Bell had stated in his letter to the defendants that he had written to Mr. Burdick that the defendants would look to him and his associates for protection against all damages in the action, for the reason that they signed the undertaking and bond upon which the actions were based for his benefit, and on his and Mr. White's promise to protect them, this part of the letter would be competent evidence, if material, without producing or accounting for the original letters. Now, instead of so writing the letter, he therein says: "I have sent Mr. Burdick, under date of March 3, two letters, copies of which I herewith hand you." Such copies contained statements by Mr. Bell which made them material as a part of his cross-examination, and they were just as competent as the originals would be; for they were, in effect, Bell's statement to the defendants as to what he had written to Burdick. The rulings were right.

4. The plaintiff's last claim is to the effect that the verdict is not sustained by the evidence. We have examined the record with reference to this claim, and have reached the conclusion that, while it may, and probably must, be conceded that the preponderance of the evidence was in favor of the plaintiff, yet there is evidence fairly tending to sustain the verdict, and we cannot disturb it.

Order affirmed.

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BUCKINGHAM APARTMENT HOUSE COMPANY v. ALLAN H. DAFOE.

December 7, 1899.

Nos. 11,764—(133).

Landlord and Tenant—Surrender of Premises—Evidence.

In an action to recover rent, it is *held* that the undisputed evidence was such as to require, as a matter of law, a finding to the effect that the defendant surrendered the demised premises, and that the plaintiff accepted them and resumed possession thereof.

Action in the municipal court of St. Paul to recover $130 on a written lease. The case was tried before Hine, J., who found in favor of plaintiff for the amount demanded; and from an order denying a motion for a new trial, defendant appealed. Reversed.

Charles H. Taylor, for appellant.

William G. White, for respondent.

START, C. J.

The complaint alleges that the parties hereto made a written lease whereby the plaintiff leased one of its flats in its apartment house known as the "Buckingham" to the defendant for the term of 14 months from July 1, 1896, for the stipulated rent of $32.50 a month; that the defendant paid the rent to April 15, 1897, but there is still due from him as unpaid rent the sum of $130. The defendant by his answer denied the execution of the lease, but admitted and alleged that he entered into possession of the premises July 1, 1896, as a tenant at will, and continued to occupy the same and to pay rent therefor at the rate of $32.50 a month until May 1, 1897, at which time he vacated and surrendered up the premises to the plaintiff, who accepted them.

On the trial the plaintiff offered in evidence a written lease of the premises for 14 months, purporting to have been executed on its behalf by an agent; but, as it did not appear that the agent was authorized in writing to execute the lease, it was excluded by the trial court on the ground that it was within the statute of frauds and void. The court found as a fact that the defendant entered into the possession of the premises on July 1, 1896, and agreed to pay as

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rent therefor $32.50 per month on the first day of each month in advance; that on May 2, 1897, he vacated the premises, but he never gave any notice of the termination of his tenancy; and, further, that there was never any surrender of the premises by the defendant, and an acceptance thereof by the plaintiff. As a conclusion of law, the court ordered judgment for the plaintiff for the amount claimed. The defendant appealed from an order denying his motion for a new trial.

The defendant's first contention is that the plaintiff's cause of action was not based upon any liability of the defendant as a tenant at will or from month to month, but upon an express contract and lease for the term of 14 months, and that, when it appeared that such lease was void, the plaintiff could not recover upon the tenancy admitted in the answer. The law, as declared by the decisions of this court, seems to be otherwise. Finch v. Moore, 50 Minn. 116, 52 N. W. 384; Prendergast v. Searle, 74 Minn. 333, 77 N. W. 231.

The second claim of the defendant is that the evidence as to a surrender of the premises and an acceptance thereof by the plaintiff is undisputed and conclusive in his favor. Any acts which are equivalent to an agreement, express or implied, on the part of the tenant and of the landlord, that the former surrenders and the latter resumes the demised premises, constitute a surrender. Dayton v. Craik, 26 Minn. 133, 1 N. W. 813. We are of the opinion that the undisputed evidence shows a surrender of the premises, within the rule stated.

The defendant claims a surrender of the premises to the manager of the building, Mr. Moore, but the plaintiff claims that it was not shown that he was the agent of the plaintiff for any purpose. The evidence shows that the National Investment Company, a corporation, had the management of the apartment house of which the flat in question was a part, by virtue of a written contract between it and the plaintiff, but the evidence does not show the terms of the contract. The undisputed evidence, however, is to the effect that the investment company placed Moore in direct charge of the building as its agent, and as such he had an office therein; that, acting under its directions, he had charge of all of the apartments and

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flats in the building, and was the only person appointed by the investment company to look after them; that he made leases for them, collected the rents, gave receipts therefor, and paid the money over to the investment company; and that, when apartments were vacated or surrendered, he would re-rent them. He also received the keys from outgoing tenants, and did all that was necessary to be done in conducting the business in the building, under general authority from the investment company. There was no evidence on the part of the plaintiff or otherwise tending to show that Moore was not authorized to do on its behalf just what he did do, or that it had no knowledge as to his acts. If the investment company was not authorized thus to place Moore in the charge and management of the building, and so to rent the flats and apartments therein for and on behalf of the plaintiff, it was a fact peculiarly within its own knowledge; yet it was silent on the trial. A principal is bound by the acts of his agent which are within the apparent authority which he holds the agent out to the public as possessing. Tice v. Russell, 43 Minn. 66, 44 N. W. 886.

But counsel for plaintiff lays great stress on the fact that Moore was the agent, not of the plaintiff, but of the investment company, and that the authority of the latter in the premises was not shown by producing the written contract. The defendant was not a party to this contract, and it is immaterial, so far as he is concerned, what the actual authority of the investment company was, provided its acts showing a surrender of the premises were within its apparent authority. It was a corporation, and could only act by an agent; and Moore's acts were its own, and within the apparent scope of its authority, and binding upon the plaintiff.

This brings us to the question whether there was in fact a surrender of the premises to Moore, and an acceptance by him. The objections urged on behalf of the plaintiff, that this question cannot be considered by this court, because a certain receipt received in evidence is no part of the settled case, and that the certificate of the trial judge does not show that the record contains all of the evidence, have been cured by an amended return pursuant to the order of this court. The evidence shows that the defendant vacated the

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premises May 1 or 2, 1897; that he had been paying rent from month to month, and that, when he left, the rent was unpaid from April 15; that he notified Moore, about two weeks before he vacated the flat, that he was going out; that, on the day he left, Moore was not in the building, and on May 18 the defendant returned, found Moore in the building, paid him a half month's rent, $16.25, and took his receipt therefor as the agent of the investment company, which specified that it was for the rent of the flat from April 15 to April 30, 1897; that the rent for the extra day or two in May was settled by the defendant leaving a Yale lock which he had put on the door of the flat. The evidence further shows that the keys of the flat were then turned over to Moore, who accepted and retained them without objections or conditions; that he tried to re-rent the flat as soon as he received the keys, and had applications therefor, but he did not succeed in so doing while he remained in charge of the building, which was until September 1, 1897; and, further, that no demand was ever made upon the defendant for further rent until after there was a change of managers of the building. All of this evidence was uncontradicted, except that, on the question whether Moore made any claim upon the defendant for further rent, he testified as follows:

"Q. Where did you say you were when Mr. Dafoe surrendered up the keys? A. At the Buckingham. Q. Did you ever make any demand on Mr. Dafoe for the rent of those premises after that time? A. I think I sent him a bill. Q. When? A. At the first of each month. Q. Are you sure about that? A. I can't say positively. Q. Isn't it a matter of fact that you never did, as long as you remained manager, or afterwards? A. I can't say one way or the other. I am not clear on that point."

Other than this, the evidence is undisputed, and no claim can be made that it is not entirely credible. Upon the whole record, it is clear that the evidence is not simply sufficient to have justified a finding in favor of the defendant upon this question of the surrender and acceptance of the demised premises, but that it required such a finding as a matter of law.

Order reversed, and a new trial granted.

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WILLIAM BATHKE v. EDWARD R. KRASSIN and Others.

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December 7, 1899.

Nos. 11,776—(121).

New Trial—Joint and Several Motion.

A notice by three defendants to the effect that they and each of them will move the court for a new trial is a joint and several motion; that is, they all ask for a new trial as to all, and each for a new trial as to himself.

Alienation of Affection—Verdict Excessive.

Held, that the evidence does not sustain the verdict as to two of the defendants, but that it does as to one of them, except that the award of $5,000 damages for alienating the affections of plaintiff's wife is so excessive as to justify the conclusion that it was the result of passion or prejudice.

Action in the district court for Waseca county against Edward R. Krassin, John Krassin and Stephen Krassin to recover $20,000 for alienation of the affections of plaintiff's wife. The case was tried before Buckham, J., and a jury, which rendered a verdict in favor of plaintiff and against all the defendants for $5,000; and from an order denying a motion for a new trial, defendants appealed. Reversed.

E. B. Collister, *P. McGovern* and *Geo. E. Child*, for appellants.

John Moonan, for respondent.

START, C. J.

The plaintiff married the sister of the defendants on December 5, 1896. They were then each 28 years old. On May 1, 1897, she left her husband, and has not lived with him since. This action was brought June 6, 1898, by the husband against the brothers for alienating the affections of his wife, and inducing her to leave him. The first trial resulted in a verdict of $5,000 against the defendants, which was set aside as excessive, and a new trial granted by the trial court. The second trial resulted in a verdict for the plaintiff for a like amount. Thereupon the defendants made a motion for a new trial. The notice thereof was to the effect that the defend-

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ants, Edward R. Krassin, John Krassin, and Stephen Krassin, and each of them, would, at the time and place named, move the court for a new trial on the ground that the verdict is not justified by the evidence, errors of law occurring at the trial, and excessive damages appearing to have been given by the jury under the influence of passion and prejudice. The court made its order denying the motion, from which the defendants appealed.

The plaintiff claims that the motion was a joint one for a new trial on behalf of all of the defendants; hence, if the evidence sustains the verdict as to one of the defendants, the motion was properly denied as to all of the defendants, within the rule of Miller v. Adamson, 45 Minn. 99, 47 N. W. 452. The construction given to this motion by plaintiff's counsel is that it is a motion by all of the defendants, and each of them, for a new trial of the action as to all of the defendants jointly. It is possible so to construe the notice, but such a construction is too technical for a just and practical administration of justice. Our construction of it is that it is a joint and several motion for a new trial; that is, all of the defendants ask for a new trial as to all, and each of them asks it for himself.

Whatever may be the fact as to the defendant Edward R. Krassin, there can be no reasonable claim made that the evidence is sufficient to sustain a verdict against either of the defendants John Krassin or Stephen Krassin. This is practically conceded by the plaintiff's counsel, who bases his claim for an affirmance of the order as to them upon the proposition that the motion was joint, and that the evidence sustains the verdict as to Edward R. Krassin. As to the defendants John and Stephen, the only evidence claimed to have any tendency to show that they had anything whatever to do with the plaintiff's wife leaving him is to the effect that they were on friendly terms with the plaintiff before his marriage, and that afterwards they would not speak to him, and that one of them pointed a revolver towards him; and, further, that after their sister had left her husband, and some three weeks thereafter, they, at her request, went with her to the plaintiff's house to get certain personal property belonging to her. There is no evidence that either of them ever did or said anything to induce their sister to leave

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her husband. The revolver episode was wholly irrelevant to any issue in this case. Such evidence is manifestly insufficient to sustain a verdict against the defendants John and Stephen, and it must be set aside, and a new trial granted, as to them.

The evidence as to the defendant Edward R. Krassin was conflicting, and we are of the opinion that it is sufficient to sustain the verdict against him except as to the award of damages. As there must be a new trial as to him on the ground that the damages are excessive, we refrain from discussing the evidence, except incidentally in connection with the question as to the damages.

The first verdict was for $5,000, just the amount of the second one. The trial court set aside the first verdict on the ground that it was excessive, but declined to disturb the second one. While courts ought to be very conservative in setting aside verdicts—particularly a second verdict—as excessive where the first one was vacated for the same cause, yet, where the amount of a verdict is manifestly so excessive as to warrant no other reasonable conclusion except that it was the result of passion or prejudice, it is the duty of the court to set it aside, no matter how many similar verdicts may have been vacated for the same cause, for justice must be administered according to reason, not passion. Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. Such is this case. The spirit of the jury is shown by the fact that they returned a verdict of $5,000 against two of the defendants as to whom there was no evidence tending to establish a cause of action against either of them. There is no evidence in the case that the defendant Edward ever advised his sister to separate from her husband, or that he ever directly sought to induce her to do so. But the evidence on the part of the plaintiff does tend to show that he was displeased with the marriage; that his influence over his sister was pronounced; and that immediately after he learned of the marriage, and up to the time the wife finally left her husband, he frequently, in the presence of his sister, disparaged, criticised, and belittled the husband, his house, his farm, his work, and his financial condition. Such conduct may have been one of the inducing causes of the wife's separation from her husband.

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But it is apparent from the evidence that, if she ever had any genuine affection for her husband, she quickly reached the crisis "when love begins to sicken and decay." Three days after the marriage she wrote to him, protesting that she did and always would love him truly, but at the same time reproached him because he had not prepared a better home for her, and declared that she was going to leave, and he could do whatever he pleased. The day after writing this letter, she went away on a visit, without her husband's knowledge or consent, and was gone about a month, when she returned to him, and remained until the May following, when she left him, and has not since returned to him. It is a fair inference from the evidence that the wife was disappointed in the financial condition of her husband, and that this was one of the causes, if not the cause, for her leaving him. The evidence also tends to show that the plaintiff, while not specially blamable in the first instance for the separation, has stood somewhat upon his dignity, and made no earnest efforts to secure a reconciliation since his wife left him the last time. Upon the whole record we are of the opinion that the award of damages, when compared with the evidence, is so excessive as clearly to justify the conclusion that the verdict was the result of passion or prejudice.

Order reversed, and new trial granted.

ANNA O. OFTELIE v. TOWN OF HAMMOND.

December 7, 1899.

Nos. 11,820—(166).

Surface Water—Negligence.

In an action against a town, based upon its alleged negligence in constructing and maintaining certain culverts across the grade of one of its highways, whereby surface water was collected and discharged upon the plaintiff's land, to her injury, *held*:

Rights and Duties of Town.

That the trial court did not err, in refusing to charge the jury that a town, in the disposition of surface water, has the same rights, and is

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subject to the same liabilities, as an individual, for the reason that it was an abstract proposition as to this case.

Liability of Landowner.

That the liability of a landowner for diverting surface water proper, to the injury of another, depends upon the necessity and reasonableness of his act. Sheehan v. Flynn, 59 Minn. 436, followed.

Refusal to Charge Jury.

The rule that the court is not bound to give a request which has been substantially and plainly given in the general charge, applied.

Acts of Town Supervisors.

That an instruction to the effect that a town is not liable for the acts of its supervisors which are done in the execution of some merely private purpose, although not relevant to any issue, was not reversible error, in view of the undisputed facts of this case.

Action in the district court for Polk county to recover $2,000 damages sustained by reason of defendant's negligence in causing surface water to flow on plaintiff's land. The case was tried before Watts, J., and a jury, which rendered a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Ole J. Vaule, for appellant.

L. E. Gossman, for respondent.

START, C. J.

The plaintiff is the owner of the southwest ¼ of section 22 in the defendant town, along the east side of which there is a public highway. She brought this action to recover damages which she claims to have been sustained by reason of the defendant's negligently constructing and maintaining a culvert across the grade of such road at the northeast and at the southeast corners of her land, thereby causing the surface water collected in the ditches along the road to flow upon her land in destructive quantities. Verdict for the defendant, and the plaintiff appealed from an order denying her motion for a new trial. The assignments of error relate solely to the instructions of the court to the jury, and to its refusal to give certain special requests on behalf of the plaintiff.

Section 22, of which the plaintiff's farm is a part, and section 15,

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adjoining it on the north, are flat, prairie land, with no well-defined water courses or channels. The evidence on the part of the plaintiff tended to show that the east ½ of section 22, and 60 acres of the southeast corner of section 15, sloped slightly towards the south, and that in the absence of roads, drains, ditches, or culverts mentioned in the complaint, the surface water therefrom would naturally flow south, along natural depressions in the prairie, without going upon the plaintiff's land, but that, by reason of such roads, ditches, and culverts maintained by the defendant, such surface water was discharged upon the plaintiff's land in destructive quantities. The evidence on the part of the defendant tended to show that section 22 slopes to the west and northwest, and that the natural drainage of the surface water from the east ½ of the section is to the west, and over the plaintiff's land, and that before the road, ditches, and culverts were constructed, it flowed upon the plaintiff's land.

It is admitted that from the center of section 22 there is a road maintained by private parties, with a ditch on the north side of it, running to the east line of the section, and that this ditch connects with the culvert at the northeast corner of plaintiff's land. On the south side of a road going east and west on the south side of the section there is a large drainage ditch, and plaintiff's evidence tends to show that the waters complained of by her might have been reasonably drained into this ditch without damage to any one. The evidence on the part of the defendant tends to show that the two culverts in the north and south grade were necessary for the proper construction and drainage of the highway, and that the ditches and grades were properly constructed and laid out, and that they benefited the road and the adjoining land,—particularly plaintiff's land; that in their construction there was no negligence on the part of the town, or its officers in charge of the work; and that all of the work, culverts, and ditches were necessary; and that proper outlets were made for all.

1. The first assignment of error is that the court erred in refusing to give to the jury plaintiff's first request, which was this:

"In regard to drainage and the disposition of surface water a

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town has the same rights, and is subject to the same liabilities, as an individual."

This request states the law correctly, but it is an abstract proposition as to this case. Counsel for plaintiff, however, claims that it ought to have been given, for the reason that, public roads being a public necessity, it would be natural for the jury to believe that the town, in draining its roads, had greater rights than a private owner would have to drain his land. But the request does not attempt to define the rights and liabilities of an individual owner as to surface water, and, if given, it could not legitimately have been of any assistance to the jury. The court is not bound to give to the jury a request to charge, although correct in the abstract, which does not bear upon the issues on trial. Wilcox v. Chicago, M. & St. P. Ry. Co., 24 Minn. 269. The trial court did not err in refusing the request.

2. The plaintiff's second and third requests were as follows:

"A landowner or occupant of land, whether a town or an individual, cannot collect surface water in drains and ditches, and lead it out of its natural course, and throw it upon the land of another in large and destructive quantities, to the latter's damage, when it naturally would flow in some other direction. One may assist nature in hastening surface water onward in its flow, but cannot lawfully divert water out of its natural course, to the damage of another."

The refusal of the court to give them is assigned as error. They were rightly refused, for the reason that, as applied to surface water, they were an incomplete statement of the law, and liable to mislead, in that they omitted the element of necessity and reasonableness of the act of collecting and discharging the surface water. Brown v. Winona & S. W. Ry. Co., 53 Minn. 259, 55 N. W. 123; Sheehan v. Flynn, 59 Minn. 436, 61 N. W. 462; Burnett v. Great Northern Ry. Co., 76 Minn. 461, 79 N. W. 523.

Counsel for the plaintiff relies upon the last case cited in support of his contention that where there is an actual diversion of surface water, to the injury of another, the doctrine of reasonable necessity does not apply. That was a case of the diversion of a natural water course, and it has no application to a case like the one we are con-

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sidering, which is one relating exclusively to the collection and discharge of surface water. The case of Sheehan v. Flynn, supra, which, in effect, holds that the liability of a landowner for diverting surface water proper, to the injury of another, depends upon the necessity and reasonableness of his act, has been practically approved in three subsequent cases. See Gilfillan v. Schmidt, 64 Minn. 29, 66 N. W. 126; Jungblum v. Minneapolis, N. U. & S. W. R. Co., 70 Minn. 153, 157, 72 N. W. 971; Burnett v. Great Northern Ry. Co., supra. And it would seem that the decision ought now to be accepted as the law of this state, without further dissent. The truth is that nearly every drainage ditch diverts surface water, to the injury of others, to a greater or less degree; and to hold, in accordance with the requests of the plaintiff, that it cannot lawfully be so diverted, no matter what the reason or necessities of the case may be, would seriously embarrass the building of public roads and the drainage of agricultural lands in the Red River valley and other parts of the state.

The plaintiff's ninth request was also properly refused. It was the last of a series of nine requests, and was substantially this:

"If you find from the evidence that the culvert * * * at the northeast corner of plaintiff's land was not reasonably necessary to the proper construction of defendant's road; that, under the foregoing instructions, the placing of said culvert at that place was negligence; and that the culvert and the road ditch connected therewith, and extending eastward therefrom, combined in collecting and carrying surface waters out of their natural course, and throwing them upon the plaintiff's land, where they could not otherwise go, —the defendant is liable for the damages caused by the waters conveyed through said culvert, although the road extending east therefrom is not a public highway, and the ditch along the north side of this road was not built or maintained by the defendant town."

This instruction is indefinite and misleading. It leaves in doubt the question whether the defendant's negligence in the premises is to be determined by the criterion of reasonable necessity for its acts, or by the test given in "the foregoing instructions." If the latter, it was clearly erroneous, for the second and third requests of the plaintiff, which we have considered, were a part of them. Indefinite and misleading instructions ought always to be refused.

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3. The plaintiff also requested the court to charge the jury that:

"If there was a natural drain within a reasonable distance, into which the surface water complained of could have been reasonably drained without damage to the plaintiff, then it was the duty of the defendant so to do; *and it would then be negligence to discharge the waters in question upon the land of the plaintiff.*"

This, plaintiff's counsel concedes, was refused by the court because it had been given in the general charge. He also concedes that all of the requests were substantially given, except the last sentence thereof, which is printed in italics. This sentence is the natural and necessary conclusion from so much of the request as was given. The court also instructed the jury that the plaintiff's action was to recover damages by reason of the defendant's negligence in constructing and maintaining the culverts in question, thereby causing water to flow upon her land, and that, in collecting and conveying surface water, one must do what is reasonable, under all the circumstances, to turn it to some natural drain or course in which it will do the least injury to his neighbor. We are of the opinion that the plaintiff's request was substantially and plainly covered by the general charge, and the court was not bound to repeat it.

4. The trial court instructed the jury that the acts of the supervisors in opening and making highways are the acts of the town, for which it is liable, but the town is not liable where their acts are not for the purpose of improving the highway, but for some private purpose,—for instance, to drain private lands. The plaintiff excepted to the part of the instruction as to the nonliability of the town. The instruction was correct, as an abstract proposition. See Peters v. Town of Fergus Falls, 35 Minn. 549, 29 N. W. 586. But it was not relevant to any issue in the case. It was not, however, reversible error to give it, for it appears from the whole record that the plaintiff could not have been prejudiced thereby. The gist of the plaintiff's cause of action, as clearly stated to the jury in the charge of the court, was the alleged negligence in constructing and maintaining the culverts in question. That the acts of supervisors as to the culverts, and as to all they did, were the acts of the town, was un-

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questioned on the trial; and the issue submitted to the jury was, not whether such acts were without the general scope of the authority of the supervisors, but whether such acts were negligently performed.

Order affirmed.

LUCIUS O. HUNT and Others v. EDWARD O'LEARY.

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December 7, 1899.

Nos. 11,828, 11,829—(95, 96).

Action—Stranger to Action.

A stranger to an action can take no part therein, except to intervene or make an application to become a party thereto.

Ejectment—Substitution of Parties.

This is an action of ejectment, and the plaintiffs made a motion that the heirs of the deceased defendant be substituted as parties, and that H., who claimed to have acquired their interest in the land, be made a party defendant. H. opposed the motion, which was denied as to him, but granted as to the heirs. H. appealed from so much of the order as related to the heirs, and the plaintiffs from the part of the order denying the motion as to H. *Held*, that the ruling of the trial court was right.

Action in the district court for Nicollet county by Lucius O. Hunt and others, substituted as plaintiffs in place of Sarah Hunt, against Edward O'Leary to recover possession of land. The court, Webber, J., made an order, granting the motion of Walden S. Hunt and others to be substituted as plaintiffs in place of Lucius O. Hunt and others, and that P. H. O'Leary and others be substituted as defendants, but denying the motion so far as it asks to have William G. Hoerr joined as defendant. From this order, cross appeals were taken by Walden S. Hunt and others and by Hoerr. Affirmed.

Thomas Hughes, for plaintiffs.

W. R. Geddes, for William G. Hoerr.

START, C. J.

More than 22 years ago this action was brought by Sarah Hunt against Edward O'Leary to recover possession of certain land in the county of Nicollet. The original parties on both sides are dead.

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The heirs of Mrs. Hunt have been substituted as plaintiffs in her place. On April 21, 1899, a motion was made by the plaintiffs that the heirs of Edward O'Leary, deceased, and William G. Hoerr, who claims to have acquired whatever interest in the land such heirs had, be substituted as defendants herein. There was no appearance in opposition to the motion, except by Hoerr, who objected to the motion as to the heirs of O'Leary because none of them then had any interest in the land which was the subject-matter of the action, and as to himself for the reason that no such action is now pending, and, if it were, the plaintiffs have lost their right to prosecute it by laches. The trial court made its order denying so much of the motion as asked to have Hoerr substituted as a defendant, and from this part of the order the plaintiffs appealed; also, granting the motion as to the heirs, and from this part of the order Hoerr appealed. These cross appeals were heard together in this court.

A brief statement of the history of the action will show that the order of the trial court was correct as to each of the appellants. The action was tried March 17, 1879, and on July 28, 1880, findings of fact and conclusions of law were made by the court, directing that the plaintiff take nothing by the action, and that the defendant recover his costs. On August 26, 1881, judgment was entered that the plaintiff take nothing by the action, and that the defendant have and remain in possession of the land. The plaintiff Sarah Hunt died intestate before this judgment was entered, and on June 27, 1881. Her heirs were substituted in her place as plaintiffs in the action September 6, 1887. No written notice of the judgment was ever served upon any of them. The costs of the action having been paid by them (there were no damages), a demand for another and second trial of the action, as provided by the statute (G. S. 1894, § 5845), was duly made, but the demand was not filed until February 1, 1899. The cause was noticed for trial November, 1887, placed on the calendar of the court for the December, 1887, term thereof, and was set for trial in vacation on eight days' notice by either party. It has never been tried the second time, and no further proceedings were taken in the action by the plaintiffs until they made the motion on which the order appealed from was based.

The defendant O'Leary died intestate August 1, 1888, and Hoerr

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claims to have purchased the land from his heirs in March, 1897, for a valuable consideration, in reliance upon the judgment so entered in this action, and without any notice that any demand for a second trial had been made. The Hunt heirs, as they claim, were, however, at this time, and had been since about 1884, in the actual and exclusive possession of the land. The reason alleged by the plaintiffs why they did not bring the action to trial is that they had agreed upon a basis for the settlement of the action with O'Leary, but that it was not carried out, by reason of his death; that the negotiations were resumed with his heirs, but a settlement was delayed by the death of one of the Hunt heirs.

1. The order on the appeal by the plaintiffs must be affirmed. The payment of the costs and the service of a written demand for another trial of the action secured to them the absolute right to a retrial of the action, although the demand and proof of service were not filed in the office of the clerk of the court. When they noticed the cause for a second trial, if the defendant had challenged their right to proceed they would then have been obliged to make proof of the payment of the costs and the service of the demand. The legal effect of the payment of the costs and service of the demand for another trial was to deprive the judgment entered as the result of the first trial of all force as a final judgment, for the statute expressly provides that the judgment on the second trial shall be annexed to the judgment roll of the former trial, and be the final determination of the rights of the parties. G. S. 1894, §§ 5845, 5846.

The claim of Hoerr is that he bought the land of the heirs of the original defendant in reliance on the judgment on the first trial, and without notice that it was not a final judgment, for the reason that he had no notice that any demand for a second trial had been made, there being nothing of record to show that such was the case. On the other hand, the plaintiffs claim that he had notice of all the rights secured to them by the demand for a second trial, because they were in the absolute possession of the land. Now, the plaintiffs, by their motion, sought to make Hoerr a party defendant in this action, and thereby compel him to litigate therein their respective claims. He, in effect, insists on keeping out of this action as a party; leaving the controversy between the plaintiffs and him-

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self to be determined, if at all, in an independent action. It is clear that, if the plaintiffs were in possession as claimed, their rights cannot be prejudiced by remitting them to such independent action. It may be convenient and beneficial to the plaintiffs to have the controversy settled in this action, but, in view of their laches in the premises, the trial court was well warranted in denying their motion to make Hoerr a party to this action against his will.

2. As to the appeal of Hoerr, little need be said. He insists that the order substituting the heirs of O'Leary as defendants must be reversed on his appeal, because, as he claims, they have no interest in the subject-matter of the action, he having purchased it of them. How does this concern him, unless he voluntarily intervenes in this action, or is made a party thereto? He insists on keeping out of the action, and the court says he may. He cannot be heard as to any of the proceedings in this action, and remain a stranger to it. A stranger to an action can take no part therein, except to intervene or to make an application to become a party thereto. Mann v. Flower, 26 Minn. 479, 5 N. W. 365.

Order affirmed on both appeals.

FARRAGUT FIRE INSURANCE COMPANY v. OSCAR H. SHEPLEY and Another.

December 7, 1899.

Nos. 11,887—(110).

Findings Supported by Evidence.

Evidence *held* to support the trial court's findings of fact.

Appeal by defendants from a judgment of the municipal court of Minneapolis in favor of plaintiff, entered pursuant to the findings of Kerr, J. Affirmed.

Smith & Parsons, for appellants.

Brown, Reed, Merrill & Buffington, for respondent.

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START, C.

This is an action upon an insurance agency bond executed by the defendant Shepley, as principal, and the defendant Brown, as surety, to the plaintiff, the condition of which was to the effect that Shepley should account for and pay over to the plaintiff monthly, or when demanded, all sums received by him for insurance policies issued by him as the agent of the plaintiff. The complaint alleged that Shepley, as such agent, issued policies for the plaintiff, and received as premiums thereon for it the sum of $1,039.83 over all of his commissions and rebates, and that he failed to account for and pay over to the plaintiff the sum of $344.84 thereof, although payment thereof was duly demanded. The answer admitted the agency of Shepley and the execution of the bond, and alleges that he "wrote gross premiums for said plaintiff, amounting to the sum of $1,453.67," and set up a counterclaim for a contingent commission. It also denied the allegations of the complaint except as admitted. The cause was tried by the court without a jury. The findings of fact were to the effect that the allegations of the complaint were true, and judgment was entered for the plaintiff for the sum of $344.84 and interest, from which the defendants appealed.

The assignments of error raise the question whether the findings of fact are sustained by the evidence. The appellants claim that there was no evidence that Shepley ever received or collected any premiums whatever. The defendant Shepley was called as a witness for the plaintiff. He admitted that the premiums on the policies written by him for the plaintiff amounted to the gross sum of $1,453.67; that he signed the policies himself, which were in the form known as the "Minnesota Standard Fire Insurance Policy." He made no claim that he had not received the premium, or that he had paid or accounted for the balance demanded by the plaintiff. His admissions and his testimony, and the manner in which he gave it, in connection with the fact that the policies which he signed and issued contained an express statement that the premium had been paid in full (see Laws 1895, c. 175, § 53), were sufficient to sustain the findings of the trial court.

Judgment affirmed.

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JAMES E. WHITE v. LUKE MADIGAN and Others.

December 8, 1899.

Nos. 11,809—(117).

Mortgage—Authority of Loan Agent to Foreclose.

In one of the so-called "Kelley" cases it is *held* that, on the evidence, the trial court would not have been warranted in finding that a foreclosure of a mortgage, wherein plaintiff was the mortgagee, made under the direction of the Kelleys, was authorized by the mortgagee, either expressly or by implication.

Action in the district court for Meeker county by plaintiff, as executor of Aaron Bisbee, deceased, to foreclose a mortgage executed by defendants Madigan and wife. The case was tried before Powers, J., who found in favor of plaintiff; and from an order denying a motion for a new trial, defendant Meeker County Bank and defendant E. B. Benson, to whom the bank had procured to be executed the quitclaim deed referred to in the opinion, appealed. Affirmed.

Uri L. Lamprey, for appellants.

Woods, Kingman & Wallace, for respondent.

COLLINS, J.

This is another of the vexatious "Kelley" cases, and, on the facts, very much like that of Dexter v. Morrow, 76 Minn. 413, 79 N. W. 394. Plaintiff mortgagee resided in Vermont, and has never been in this state. For a number of years the Kelleys had loaned money for him upon real-estate mortgage security. When notes and mortgages were duly executed, and the latter properly recorded, they were sent to plaintiff at his home, and kept in his possession. As the interest coupons became due, or as the notes matured, they were forwarded to the Kelleys for collection. In the case at bar plaintiff had forwarded the interest coupons as they became due, and the Kelleys, without collecting a dollar of the maker, remitted as if they had been paid. They also remitted as for interest after the principal note matured. The plaintiff was not informed that the interest had

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not been paid, and supposed it had. He retained possession of the principal note and the mortgage.

In 1895 the Kelleys forwarded the coupons which they had paid to an agent at the county seat of the county in which the real estate in question was situate, and this agent employed attorneys to foreclose the mortgage under the power. This was done, the only authority possessed by the attorneys for the act being the coupons in their hands and the verbal instructions of the agent to foreclose. The sale was in April, 1895, and the premises were bid off in the name of A. F. Kelley for the full amount due on the note, with the costs of foreclosure. No money was actually paid to the sheriff, but he executed and acknowledged the certificate and other papers pertaining to the proceedings; and all of these were recorded. The defendant bank held a second mortgage on the premises, and within the year resolved to redeem. It did not do this directly, but, after the year of redemption had expired, procured a quitclaim deed from A. F. Kelley, paying him the full sum due. It is hardly necessary to say that the foreclosure proceedings were not known to plaintiff until after the Kelleys became insolvent, and that no part of the money paid by the bank ever reached his hands

This was an action brought to foreclose the mortgage, in which the bank was made a defendant, and wherein it defended on the ground that the foreclosure under the power was authorized and regular. The court below held to the contrary, and its decision will have to be affirmed.

The entire case rests upon the testimony of the plaintiff, taken by deposition, and the oral evidence, at the trial, of A. F. Kelley. There was no correspondence between these persons, so far as appears from the record, which would throw light on this transaction, or which would tend to indicate what were the real relations between them. There was nothing but the bare facts as hereinbefore stated. It is true that the plaintiff admitted, when testifying, that in the course of his dealings with A. F. Kelley the latter had foreclosed two mortgages for him, "but not without my knowledge and direction." And Kelley himself testified that plaintiff "relied on us to take care of his business; to do it as we would our own"; and also

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that he had previously foreclosed mortgages belonging to plaintiff in the same way as was this, bidding off the property in his own name. But this was no evidence that plaintiff ever knew that Kelley bid in the property in his own name; and the fact that plaintiff relied on the Kelleys in a general way to look after his business as they would their own would not authorize the firm to foreclose a mortgage which was not in their custody, and had not been from the time it was forwarded to the mortgagee, immediately upon being recorded. See Dexter v. Morrow, supra, in which a like expression is considered. Nor did Kelley, when testifying, claim to have any authority to foreclose this particular mortgage, while the plaintiff himself positively denied that he gave any such authority, or that he knew what was being done or had been done until long after the bank obtained its quitclaim deed.

While the defendant bank has been defrauded of its money, and the loss is a hardship, there is absolutely no ground upon which to sustain its claim. The evidence is conclusive that the plaintiff kept possession of all of his securities, and simply expected the Kelleys to collect when, and not until, the papers were sent forward for that purpose. He had no knowledge, actual or to be implied, that they were doing more than this, except as they might have foreclosed mortgages, not to exceed three in fourteen years, under his special direction and authority He did not even know that the interest was not being paid by the proper party. There is no evidence at all upon which to base a claim that the Kelleys were the general agents of the plaintiff, and nobody claims that they were specially authorized to make the foreclosure.

What was said in the case of Budd v. Broen, 75 Minn. 316, 77 N. W. 979, as to the potency of the proof in that case that the mortgagee retained possession of her securities, and as to the distinction between that case and those of Hare v. Bailey, 73 Minn. 409, 76 N. W. 213, and General Convention C. M. v. Torkelson, 73 Minn. 401, 76 N. W. 215, is very pertinent, and directly in point here. Nor could authority to collect the principal be implied from the fact that the Kelleys made the loan originally. Nor could authority be implied from the fact that plaintiff forwarded the interest coupons for

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collection, instead of keeping them until he received the money. Trull v. Hammond, 71 Minn. 172, 73 N. W. 642; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546. He might have been willing to intrust an agent with the collection of interest, and unwilling to place in his hands the collection of the principal note, or the custody of the collateral mortgage. Without having had in his hands at any time anything more than the coupons, and without other circumstances which might show authority, express or implied, a foreclosure by such an agent could not be upheld. Burchard v. Hull, 71 Minn. 430, 74 N. W. 163. See also Dwight v. Lenz, supra. The proof here is wholly insufficient, and a finding that the Kelleys had authority to cause the mortgage to be foreclosed would be without evidence to support it.

Order affirmed.

D. H. HEBNER v. GREAT NORTHERN RAILWAY COMPANY.

December 8, 1899.

Nos. 11,845—(129).

Libel—Record of Railway Employee—Publication.

Defendant railroad company kept a book in which was written a record of each of its employees, and, if discharged, for what reason. Against plaintiff's name in this book, and under the heading of "Remarks," appeared the words: "Dismissed; insolent and abusive to company's patrons." The only publication of the words was that, when plaintiff applied to the superintendent of telegraphs for what is called a "service card," the book was brought to the office, and read by one clerk in the presence of another and the superintendent and the plaintiff, that the card might be filled out. This was done, and the card, as filled, and on which appeared the derogatory words, was signed by the superintendent, and then handed to plaintiff. The record was kept for the information of those whose business it was to employ men for defendant's service. *Held*, as a question of law, that the communication was of a privileged character, and made upon a privileged occasion; the prima facie effect thereof being to overcome and rebut the quality or element of malice, and to cast upon plaintiff, in an action for libel, the necessity of showing malice in fact.

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Privileged Communication.

A communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.

Malice—Want of Probable Cause.

Held, in the case at bar, that the evidence failed to show want of probable cause, such as would justify a reasonably prudent man in making the entry, and that the fact of malice, essential to plaintiff's recovery, was not established.

Action in the district court for Ramsey county to recover $15,000 damages for libel. The case was tried before Otis, J., who directed a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

T. J. McDermott and *S. L. Pierce*, for appellant.

C. Wellington, for respondent.

COLLINS, J.

Action for libel, and at the conclusion of the trial a verdict was directed and returned in favor of the defendant corporation.

Plaintiff had been in its employ at Browns Valley, as a telegraph operator and station agent, for about four years prior to the alleged publication, and was then discharged. As was the custom of defendant with all of its employees, a record of plaintiff's service, and the reason for his discharge, was kept in the general office, and from the record it appeared that he had been insolent and abusive to the patrons of defendant company. It was also the custom of the company to issue, on the request of any person who had left its employ, what was known as a "service card," in which appeared a part of this record, and such a card was issued to plaintiff. It was signed by the superintendent of the defendant's telegraph lines, and under the heading of "Remarks" were the words: "Dismissed; insolent and abusive to company's patrons." It was held below that there had been a sufficient publication of these words by reading the written record in the presence of clerks in the superintendent's office

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when plaintiff applied for his service card, and also that they were libelous on their face, if untrue; and it is conceded on this appeal that the only question to be determined is whether the evidence adduced at the trial would have warranted the jury in finding that the defendant, when publishing these words of and concerning plaintiff, was actuated by malice, or did otherwise than a reasonably prudent man would have done under the same circumstances.

It was undisputed that the object of the defendant in keeping a record of each of its employees, and, in case men had been discharged, for what reason, is that those having to employ may be properly advised of the qualifications or disqualifications of all who have theretofore been in the defendant's service. The absolute propriety and necessity of having this information, where it is accessible to those whose work it is to select the hundreds of men capable of properly performing arduous and responsible duties in connection with defendant's business as a common carrier, is obvious. It was also undisputed at the trial that the real purpose of the service card is to assist men to obtain employment when going from one company to another, although such a card might prove a very serious obstacle to securing a new position when presented by a man discharged for cause or supposed cause, because the reason for such discharge would be stated. It is also beyond question that such a card may or may not be shown by one seeking employment, for this is a matter optional with the holder.

It stands conceded that this was a highly-privileged communication, and that, in the absence of express malice on its part, there could be no recovery as against defendant. It was made upon a subject-matter in which the person communicating it had a deep interest, as well as a duty to perform, and was made to a person having a corresponding interest and duty. If one of defendant's servants had demonstrated his unfitness for a position held by him, it was for its interest, as well as for the interest of the public, that steps should be taken which would render the servant qualified and capable, or that he be dismissed. It would not only be for the interest of the company to remedy the evil, and to act so as to stop all future complaints, but it would be a matter of duty to the public. The record was made in one of the books of the corporation, kept

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for its own information, and the only publication complained of was when the record was communicated by one of the clerks employed by defendant in the office of the telegraph superintendent to another clerk; both being interested, and both acting strictly within the line of duty, and also acting that they might have information upon which to fill out the card which plaintiff had requested might be delivered to him. There was no undue publicity, or even public dissemination of the contents of the book; and there is nothing in the record before us which indicates that care was not taken to confine this information to such persons as were directly interested, and whose duty it was to know the reason for plaintiff's dismissal from defendant's service. It is conclusively established that there was no wanton disregard of plaintiff's feelings or welfare.

The communication being of a privileged character, and having been made on a privileged occasion only, the prima facie effect was to overcome and rebut the quality or element of malice, and to cast upon plaintiff the necessity of showing malice in fact; that is, that the defendant was actuated by ill will in what it caused to be done and said, with a design causelessly and wantonly to injure the plaintiff. The law is that a communication, to be privileged, must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover. Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513; Missouri v. Richmond, 73 Tex. 568, 11 S. W. 555; Bacon v. Michigan, 66 Mich. 166, 33 N. W. 181.

The plaintiff's efforts to show malice on defendant's part were confined to testimony which counsel claim tended to show that the charge of insolence and abuse towards those who patronized the company was false, and also to evidence of the existence of certain circumstances which counsel contend indicate bad faith when making the record, and also when publishing it. The charges of bad behavior which were lodged with defendant company were with respect to plaintiff's conduct towards commercial travelers who had business at his station; and plaintiff's proofs, aside from his unqual-

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ified denial (to which reference will be made later) of having been insolent and abusive, and the testimony of a man who had worked with him for a short time, were from residents of the town who had from time to time seen him at work. But counsel admit that on the evidence the jury would have been warranted in finding either way upon the issue as to the truth or falsity of the charges. And it is quite certain that on this testimony as to his general conduct towards patrons a jury would not have been justified in finding that plaintiff had not been impudent when dealing with traveling men, if they had not misrepresented him. And there was absolutely nothing in this class of testimony, taken by itself, which would tend to show that defendant did not have probable cause to believe these charges to be true when making its record.

The fact was that, after the claim had come to defendant that plaintiff was treating its patrons with insolence, the traveling freight agent was ordered to investigate, and for that purpose visited the plaintiff at Browns Valley. He there talked with plaintiff, informing him that he was accused of being insolent and abusive in his dealings with traveling men. This circumstance the plaintiff admitted, and also that he was then told by the agent that he must be more civil and courteous in the future, if he expected to retain his place. The agent had testified that, in response, plaintiff had answered that he might have been impatient and uncivil, but that he would try to do better; and, when plaintiff was asked if he had not so responded, his reply was that he "could not exactly remember." He would not deny that he did so answer when questioned by the traveling freight agent. The evidence was, however, that the caution and reprimand did no good, and that on account of the continued complaints, which were also investigated, the plaintiff was afterwards discharged, upon the report and advice of the agent. It is evident from this testimony that the plaintiff did not deny the truth of the charges when he was told that they had been made, and he cannot now be heard to say that the defendant itself did not believe them to be true when it dismissed him from its employ.

But this was not all. Howard, one of the traveling men who had

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complained of plaintiff's conduct, had just cause for charging him with incivility, on plaintiff's own statement. This man had reached the station late, and the bus driver was talking with plaintiff about checking his baggage. The latter was at his desk, the driver at the ticket wicket, a few feet distant, while Howard stood a few feet beyond. The plaintiff at first declined to issue checks, and then stated that a man who would come so late "ought to be kicked off the depot platform." It is urged that perhaps this was not heard by Howard, who was further away from the plaintiff than was the driver, to whom the statement was made. Howard was not at the trial, and possibly, though close by, did not hear the remark. But it makes no difference what person was abused, or concerning whom the plaintiff was insolent. He was none the less impudent and insulting because his remark was directly addressed to the bus driver, instead of to the owner of the trunks. There was nothing in the evidence bearing upon the truth or falsity of the charges which would have justified the jurors in finding that the defendant did not act in perfect good faith. Nor did the circumstances relied on by counsel tend to show malice. Good faith in the premises would require that defendant exercise reasonable care, and nothing more, and there were no circumstances on which a claim could be maintained that there was an absence of this care.

It has been urged by counsel that because the traveling freight agent declined to furnish plaintiff with the names of persons who had complained, and to give him a hearing at which he should be confronted with his accusers, and because the agent made no inquiries of the residents at Browns Valley, it was for the jury to say whether the defendant used reasonable care. These are the circumstances appearing in evidence, and before referred to. It would seem somewhat singular if it should be held that the failure to have an investigation, at which plaintiff could be heard and the witnesses examined, was evidence that defendant had not acted with reasonable care, or that there was an absence of reasonable care because the traveling freight agent refused to plunge the patrons of the road into a quarrel with plaintiff, as would have been the result if their names had been furnished, or because he failed to inquire of the residents of Browns Valley as to plaintiff's treat-

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ment of certain traveling men whose complaints he was investigating. That defendant might act in good faith, and with the best of motives, did not demand of it any such care as that. And it must also be remembered that plaintiff had practically admitted the charges against him when questioned by the agent, and further that in one case, at least, he stood convicted of insolence on his own statement as to what occurred. If, on his own admissions, the charges seemed to be true to some extent, what further was necessary in the way of investigation, or what more was required in the exercise of reasonable care?

In conclusion, on this question of malice, it should be stated that there is no claim here that defendant's employees (the men who had observed plaintiff's conduct and had reported it, or those who investigated the charges, including the agent, and informed the company of the result of their investigations) manifested the slightest ill will or disposition to be unfair towards the plaintiff, and no claim that the clerks in the office of the superintendent of telegraphs, or the superintendent himself, exhibited anything but the kindliest spirit towards plaintiff when making the publication of which he complains. We quite agree with the learned trial judge, who said "that the evidence fails to show want of probable cause such as would justify a reasonably prudent man in making the entry, and that the fact of malice, essential to plaintiff's recovery, was not established."

Order affirmed.

AQUILLA G. OSMAN v. IVER WISTED and Another.

December 8, 1899.

Nos. 11,760—(127).

Judgment—Impeaching Officer's Return of Service.

An officer's return of service cannot be impeached by means of equivocal and evasive affidavits; and, to set aside and vacate a judgment on the ground that such a return is false, the proof of its untruthfulness must be positive, satisfactory, and convincing.

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Discretion of Court.

Held, in the case at bar, that it would have been an abuse of its sound legal discretion if, on the affidavits presented, the court below had set aside and vacated a default judgment entered in the action, and had permitted a proposed answer to be filed.

Homestead—Estoppel.

Held, further, on facts as shown, that defendant husband, who had made an assignment of all of his property exempt from execution for the benefit of his creditors, under the state insolvent laws, and also his wife, are estopped from asserting a homestead right in the real property involved in this action.

Appeal by defendants from an order of the district court for St. Louis county, Moer, J., denying a motion to open the judgment and for leave to answer. Affirmed.

Austin N. McGindley, for appellants.

W. B. Phelps, for respondent.

COLLINS, J.

Defendants appeal from an order denying their motion, made June 17, 1899, to open, vacate, and set aside a default judgment entered against them on November 20, 1897, and for leave to answer in an action brought to determine adverse claims to real property in plaintiff's possession. There are two good reasons for affirming the order:

1. There was no abuse of discretion when the motion was denied on the showing made at the hearing as to the service of the summons and complaint on each of the defendants more than 40 days prior to the entry of judgment. The service was made by a deputy sheriff, who returned that he had personally served such summons and complaint on the defendant wife, and had served on the defendant husband by leaving copies of said summons and complaint at the house of his usual abode with the defendant wife, she being a person of suitable age and discretion then residing therein. The service upon the husband was regular, and in one of the methods authorized by statute. Nor did the defendant wife deny that the return was correct as to service upon herself, her only excuse for failing to answer being that she did not read the summons and complaint when they were left in her hands, subse-

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quently mislaid them, and knew nothing of their contents until they were resurrected from a desk in the house in April, 1899. Nor did the defendant wife assert positively that copies were not left with her for defendant husband, in his absence, and at their dwelling, in exact accordance with the sheriff's return. She equivocated on this in her moving affidavit; and the only excuse offered by the defendant husband for being in default for want of answer was that his wife had mislaid the papers, if they were ever served, and that he knew nothing of them until they were brought to light as before stated.

There were also affidavits of other members of the family to the effect that but one copy of the summons and complaint was left with Mrs. Wisted, but it would have been much more satisfactory and convincing if this had been stated by the person upon whom service was actually made, instead of by persons who had very little opportunity for knowing the facts. And there were other matters appearing in regard to the service, which, taken into consideration with what has been stated, indicate very clearly that, had the court held with the defendants, and granted their motion, its action would have been wholly unwarranted, and reversible, because an abuse of the sound legal discretion which it must exercise in cases of this kind. An officer's return cannot be impeached by means of equivocal and evasive affidavits, and, to set aside and vacate a judgment on the ground that such a return is false, the proof of its untruthfulness must be positive, satisfactory, and convincing. Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541.

2. On the undisputed facts the proposed answer was without merit.

The defendant husband was the owner of two adjoining city lots, one numbered 61 and the other 63. Before purchasing lot 63, he had built a dwelling house on 61, and made it his homestead. After purchasing 63, he built an addition to his dwelling, mostly on 61 but in part on 63. He then erected a large house on the lot last mentioned, which was occupied by tenants. With his family he continued to reside in the dwelling first built, and in July, 1893, he made an assignment under our state insolvency laws for the benefit of all

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of his creditors of all of his property not exempt from execution. When making the inventory of his non-exempt assets in these insolvency proceedings, he included lot 63 as an asset, but lot 61 was omitted from such inventory. In May, 1894, by order of the court in which the proceedings were pending, the insolvent's assignee sold lot 63 to the plaintiff's wife, she paying therefor the sum of $4,250, which sum was thereafter distributed, as part of the trust funds, among the creditors. This sale was afterwards confirmed by the court, the insolvent making no objection, and the lot was duly conveyed by the assignee to the purchaser, the plaintiff's wife. By subsequent conveyance he became the owner. After the conveyances, plaintiff rented the premises, collected the rents, paid taxes, and made improvements with the knowledge of both defendants; and part of the improvements were made by plaintiff at the suggestion of defendant husband. November 20, 1893, four months after the assignment, the defendants, husband and wife, executed and delivered to one Bell a mortgage upon lot 61 in the usual form, and containing the usual covenants of seisin and warranty, in which covenants both defendants joined, which mortgage was thereafter duly foreclosed by sale of the mortgaged premises to the mortgagee. The certificate of such sale was thereafter duly assigned to one Peterson, a brother of defendant wife, and subsequently both defendants executed and delivered to him a quitclaim deed of the premises. After the expiration of the year of redemption, Peterson mortgaged the property to an insurance company for the use and benefit of defendants. This mortgage was duly foreclosed by sale to the mortgagee. There was no redemption, and in May, 1899, defendants were evicted from the premises. This motion seems to have followed immediately.

From this statement of the facts it is obvious that the proposed answer, through which defendants attempted to assert a homestead right in lot 63 when the assignment was made, was wholly devoid of merit. In fact it would be difficult to conceive of an answer less meritorious than that accompanying the motion, when the actual facts are presented. The defendant husband selected his homestead, as he had a right to do, when he made the inventory, by omit-

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ting to include lot 61, on which he had resided for many years. He waived all claim to homestead rights in lot 63 when he included it in an inventory of his property not exempt from sale on execution. He again waived any rights, if he had any, when he allowed the sale by the assignee to be confirmed without interposing any objections. He affirmed the previous selection of his homestead when he mortgaged all of lot 61, some four months after the assignment. And the defendant wife ratified and confirmed his selection of the statutory homestead when she became one of the covenantors in the mortgage, and joined in the execution and delivery of the same. Both defendants are estopped from denying that lot 61 was their homestead when the assignee made the sale of lot 63. One selection or allowance of a homestead in assignment proceedings is all that the statute recognizes, and ought to satisfy these defendants.

Order affirmed.

PETER LANGAN and Another v. SAMUEL J. IVERSON.

December 11, 1899.

Nos. 11,880—(63).

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New Trial—Grounds Stated in Motion.

If a general order granting a new trial is justified and proper on any one of the grounds set forth in the notice of motion therefor, it will be sustained on appeal to this court, even though not justified on any of the other grounds so set forth.

Statute of Frauds—Performance within a Year.

The statute of frauds (G. S. 1894, § 4209, subd. 1) does not apply to a contract which is fully performed by one of the parties at the time, or which may be performed by one of them within a year. Such statute only applies to contracts which cannot be performed by either party within a year.

Consideration of Deed—Parol Evidence.

It is competent to show by parol a consideration for a deed different from that expressed therein. Keith v. Briggs, 32 Minn. 185, followed.

Action in the district court for Ramsey county to recover a de-

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ficiency judgment for $237.30 on a mortgage alleged to have been assumed by defendant. The case was tried before Harrison, acting judge, and a jury, which rendered a judgment in favor of plaintiffs for the amount demanded; and from an order granting a motion for a new trial, plaintiffs appealed. Affirmed.

A. E. Bowe, for appellants.

The agreement was not within the statute of frauds, as not to be performed within one year. Wolke v. Fleming, 103 Ind. 105; Wood, Fr. §§ 278, 279; Addison, Cont. 312; Houghton v. Houghton, 14 Ind. 505; Haugh v. Blythe, 20 Ind. 24; Strohauer v. Voltz, 42 Mich. 444; Spann v. Cochran, 63 Tex. 240; Wilson v. Bevans, 58 Ill. 232; Brown v. Strait, 19 Ill. 88; Clinton v. Studemann, 74 Iowa, 104; Bateman v. Butler, 124 Ind. 223; Price v. Reed, 38 Mo. App. 489; Skinker v. Armstrong, 86 Va. 1011; Morris v. Gaines, 82 Tex. 255; Tuttle v. Armstead, 53 Conn. 175; Lowe v. Hamilton, 132 Ind. 406; McDill v. Gunn, 43 Ind. 315; Waterman v. Morgan, 114 Ind. 237; Turpie v. Lowe, 114 Ind. 37; Helms v. Kearns, 40 Ind. 124; Gold v. Phillips, 10 Johns. 412; Bolles v. Beach, 22 N. J. L. 680; Drury v. Tremont, 13 Allen, 168. The evidence does not tend to contradict or vary the contract. Strohauer v. Voltz, supra.

Childs, Edgerton & Wickwire, for respondent.

The alleged agreement was within the statute of frauds, because by its terms it was not to be performed within one year. Tillotson v. Boyd, 4 Sandf. (Super. Ct.) 516, 520; Lower v. Winters, 7 Cow. 263. Partial performance does not take the agreement out of the operation of the statute. Marcy v. Marcy, 91 Mass. 8; Cabot v. Haskins, 3 Pick. 83; Frary v. Sterling, 99 Mass. 461; Broadwell v. Getman, 2 Denio, 87; Lockwood v. Barnes, 3 Hill (N. Y.) 128; Pierce v. Estate, 28 Vt. 34; Browne, Fr. (5th Ed.) §§ 286–290; Warner v. Texas & P. Ry. Co., 54 Fed. 922; Peter v. Compton, 1 Smith, Lead. Cas. (8th Ed.) 614, note, Skin. 353. Parol evidence was not admissible, because tending to contradict and vary the terms of the deed. Maxwell v. Chamberlin (Miss.) 23 South. 266; Lewis v. Day, 53 Iowa, 575; Boozer v. Teague, 27 So. C. 348.

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BROWN, J.

In March, 1894, the plaintiffs were the owners of certain real property situated in Ramsey county which they had theretofore mortgaged for the sum of $500. On that day they sold and conveyed it to defendant, upon his promise and agreement, as plaintiffs allege, to assume and pay the mortgage debt, as a part of the purchase price. The deed of conveyance was executed and delivered by plaintiffs at the time the contract of sale was made, is in the usual form of such instruments, and recites that the sale is "subject to a certain mortgage of $500." The mortgage debt was due August 20, 1895,—more than a year after the contract was made. Subsequently the mortgage was foreclosed, and the property bid in at the sale by the mortgagee for about one-half the mortgage debt. The mortgagee afterwards brought suit against plaintiffs, and recovered judgment for the deficiency. On the claim that defendant assumed and agreed to pay such mortgage debt, as a part of the purchase price of the property, plaintiffs brought this action against him to recover the amount of the deficiency judgment. The defendant answered, denying the alleged agreement to pay the mortgage debt. At the trial in the court below the plaintiffs had a verdict, and from an order granting a new trial they appeal.

The motion for a new trial was based on three grounds, namely: (1) That the verdict was not justified by the evidence; (2) that the verdict was contrary to law; (3) for errors of law occurring at the trial, and excepted to by defendant. It does not appear from the order of the court upon which of these grounds the new trial was granted. No memorandum is attached to the order, and we are not otherwise informed. One of the grounds of motion being that the verdict was not justified by the evidence, and the evidence as to defendant's promise and agreement to pay the mortgage debt being conflicting, and not "manifestly and palpably" in favor of the verdict, the order granting a new trial must be affirmed, on the rule of Hicks v. Stone, 13 Minn. 398 (434). It is the duty of the appellant, in appeals of this kind, to show that the order appealed from is erroneous and not proper on any of the grounds set forth in the notice of motion for a new trial. If the order be justified or proper

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to be made on any of the grounds specified in the notice of motion, it must be sustained, though not justified as to the other grounds assigned.

This disposes of the appeal, but, in view of another trial of the action, we deem it proper and advisable to determine the other questions presented. By doing so, another appeal may be avoided.

1. It is contended by the defendant that, conceding the agreement to pay the mortgage debt to have been made, it is void, within the statute of frauds, because not to be performed within one year. The deed to defendant was executed and delivered to him at the time the contract was made, but the mortgage debt assumed and agreed to be paid was not due for more than a year thereafter; and defendant claims that, because he could not perform his part of the contract within one year, it is void. We do not find that the precise question involved in defendant's position has ever been before this court. It has been before the highest courts of sister states, and there is some conflict in the decisions. The rule adopted in England, and followed in most of the states in this country, is stated in 8 Am. & Eng. Enc. 692, as follows:

"The statute applies only to contracts which are not to be performed upon either side within a year. If all that is to be performed on one side is to be performed within a year, the contract is not within the statute."

This is the rule laid down in Donellan v. Read, 3 B. & A. 899, and followed in most of the states of this country. Wood, Fr. § 279, and cases there cited. It is not followed in Massachusetts, New York, and two or three other states. In our opinion, the rule stated is in consonance and accord with justice, is supported by the great preponderance of the authorities, and we adopt it as the law of this state. See also Durfee v. O'Brien, 16 R. I. 213, 14 Atl. 857; Washburn v. Dosch, 68 Wis. 436, 32 N. W. 551; Lowman v. Sheets, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784. It therefore follows that the contract in question, having been fully performed on the part of the plaintiffs, is not within the statute of frauds, although defendant could not perform his part within a year.

2. The defendant objected to the introduction of evidence to prove

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the alleged agreement to assume and pay the mortgage debt, on the ground that it tended to contradict and vary the terms of a written contract,—the deed. The court below overruled the objection and received the evidence. The ruling was correct. It is competent to show by parol a consideration for a deed different from that expressed therein. Kumler v. Ferguson, 7 Minn. 351 (442); Keith v. Briggs, 32 Minn. 185, 20 N. W. 91. The true consideration may always be shown.

The court below ruled correctly on both these questions at the trial, but for the reason already stated, the new trial having been granted on the ground that the verdict was not justified by the evidence, the order appealed from must be sustained.

Order affirmed.

ANDREW BENSON v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

December 11, 1899.

Nos. 11,920—(182).

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Railway—Collision between Hand Cars—Wisconsin Statute.

Defendant was engaged in repairing its track at a point in the state of Wisconsin, and employed a large number of men in and about such work, including plaintiff. Boarding cars were kept and maintained at or near the work, at which such employees were boarded and lodged. As the work progressed, the men became further removed from the boarding cars; and at their request, and for their convenience, defendant furnished them hand cars on which to transport themselves to and from their work. Defendant did not manage the boarding cars, nor operate or have control of the hand cars. Such hand cars were operated exclusively by the men, and they had full charge and control thereof. A collision occurred between two of such hand cars while the men were transporting themselves thereon to the boarding cars for their dinner, and plaintiff was injured. The collision was caused by the negligence of the employees in charge of one of such cars, and plaintiff was free from fault. *Held*, that the employees were not, within the purpose and meaning of Laws (Wis.) 1893, c. 220, at the time of such collision and injury, engaged in the discharge of their duties under their employment, and defendant is not liable.

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Action in the district court for Hennepin county to recover $1,950 damages for personal injuries. The case was tried before Harrison, J., and a jury, which rendered a verdict in favor of plaintiff for $500; and from an order granting a motion for judgment in favor of defendant notwithstanding the verdict, plaintiff appealed. Affirmed.

On a former appeal, an order sustaining a demurrer to the complaint in this action was reversed. 75 Minn. 163.

Ludvig Arctander, for appellant.

Plaintiff and his fellow laborers, in going to and coming from their work, were in the service of defendant so long as they were, with its permission and at its request, passing over its property for such transportation. Their coming and going were incidental to and a means of their labor, and necessary ingredients of their contract of employment. The use of the hand cars was an inseparable part of the work, and the men engaged in propelling the cars were engaged in performance of their duties, and acting within the scope of their employment, as much as if they had been digging or doing any other labor. Ewald v. Chicago, 70 Wis. 420; McGregor v. Auld, 83 Wis. 539; Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 173; McDonough v. Lanpher, 55 Minn. 501. The cases in other jurisdictions are in line with the Wisconsin and Minnesota decisions. Packet Co. v. McCue, 17 Wall. 508; Brydon v. Stewart, 2 Macqueen, 30; Adams v. Iron, 78 Mich. 271; Broderick v. Detroit, 56 Mich. 261; Walbert v. Trexler, 156 Pa. St. 112; Cleveland v. Martin, 13 Ind. App. 485; Parkinson v. Riley, 50 Kan. 401; Swadley v. Missouri, 118 Mo. 268.

The fellow-servant rule having been abrogated by statute, it can make no difference whether an injury be due to a defect in the appliance or place or to a careless act of another servant. In the following cases the accident was caused solely by negligent acts of coservants. Ewald v. Chicago, supra; Packet Co. v. McCue, supra; Adams v. Iron, supra; Swadley v. Missouri, supra. The principle on which it is held that one who is on his master's premises during a noon recess, or while going to or coming from work, is a servant is that such coming and going are incident to and part of the em-

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ployment. Ewald v. Chicago, supra; McGregor v. Auld, supra; Rosenbaum v. St. Paul & D. R. Co., supra; McDonough v. Lanpher, supra; Cleveland v. Martin, supra; Parkinson v. Riley, supra. Even if plaintiff were not a servant in the sense that his acts of coming and going were acts within the scope of his employment, yet there is no room for application of this distinction where the acts of coming and going did not consist merely of walking over defendant's premises, but the manner and method of transportation were prescribed, and the means furnished, by defendant as a necessary incident to the work on account of its peculiar character and the manner in which it was carried on. Where an employee is being transported free of charge by his master from his place of work, the relation of master and servant still exists, and the servant does not become a passenger, unless the fare is considered part of the compensation and the free transportation was taken into account in fixing the wages. Tunney v. Midland, L. R. 1 C. P. 291; Gillshannon v. Stony Brook, 10 Cush. 228; Seaver v. Boston, 14 Gray, 466; Russell v. Hudson, 17 N. Y. 134; Ryan v. Cumberland, 23 Pa. St. 384; Kansas v. Salmon, 11 Kan. 83; McQueen v. Central, 30 Kan. 689; Gilman v. Eastern, 10 Allen, 233; Higgins v. Hannibal, 36 Mo. 418; Vick v. New York, 95 N. Y. 267; Ross v. New York, 5 Hun, 488; Rosenbaum v. St. Paul & D. R. Co., supra; McDonough v. Lanpher, supra; Brydon v. Stewart, supra; 1 Shearman & R. Neg. § 190.

Thomas Wilson, for respondent.

BROWN, J.

Appeal from an order directing judgment for defendant notwithstanding the verdict of the jury. The action is one to recover damages for injuries to the person of plaintiff, caused, as he alleges, by the negligence of the defendant. There is no dispute or controversy as to the important or main facts.

The complaint alleges, and the evidence shows (omitting all matters not material to the questions presented) as follows: In the summer of 1897 the defendant was engaged in repairing and resurfacing its track between the stations of Altoona and Elroy, in the state of Wisconsin, in and about which it employed a large number

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of laborers, including this plaintiff. More conveniently to carry on the work, it kept and maintained on a side track, near where the repairs were being made, a number of cars in which to board and lodge the men. The defendant did not undertake to board or lodge the men, but furnished such cars for that purpose. As the work progressed, the men became further removed from the boarding cars, and for their convenience the defendant furnished and permitted them to use hand cars on which to transport themselves to and from this work. The defendant did not attempt to operate the hand cars, nor did it put any one in charge thereof. They were furnished for the use of the men, every one of whom had as much control and was as much in charge thereof as his fellow laborer. On the day in question the plaintiff was upon one of such cars, returning from his work to the boarding cars for dinner, when an approaching car overtook and collided with the car on which he was so riding, thereby throwing him from the same and inflicting the injury complained of.

The action is based on a Wisconsin statute which provides that any railroad company operating a line of railroad wholly or in part in that state shall be liable for damages sustained within the state by an employee of such company who is free from contributory negligence. Laws (Wis.) 1893, c. 220. In order to warrant a recovery under the law, it must be shown, among other things, that the employee was not guilty of contributory negligence, that he was injured while engaged in the performance of his duties, and that the injury was caused by the negligence of another employee while engaged in the discharge of, or for failure to discharge, his duties as such.

At the conclusion of the trial in the court below, both parties requested the court for a directed verdict. The court refused both requests, submitted the case to the jury, and a verdict was returned for plaintiff. Thereafter, on defendant's motion, the court ordered judgment for defendant notwithstanding the verdict. The appeal is from that order.

The only question presented for decision is whether the employees in charge of this particular piece of work were, at the time plaintiff

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received his injury, engaged in the "discharge of their duties as such," or in the line of their employment. If they were, the order appealed from should be reversed. If they were not then engaged in the discharge of their duties as such employees, the order appealed from should be affirmed.

The work for which they were employed, and in which they were engaged, was that of repairing and resurfacing defendant's track. At the time of the accident resulting in plaintiff's injury, they had ceased this work, and were on the way to the boarding cars for their dinner. So far as the evidence discloses, the defendant was not boarding the men. Plaintiff does not claim that it was. Nor had the company in any manner agreed or undertaken to transport or carry them to or from their work, on hand cars or otherwise; nor was it shown that it was defendant's custom to do so. The hand cars were furnished the men at their own request, for their own convenience, and the operation thereof was in no way under the charge or control of the defendant. The men themselves had full charge and control of such cars, and used them as they saw fit, not in the performance of any duty to defendant, nor in furtherance of defendant's work, but for their own comfort in going to and returning from their work. The cars were not defective, nor was the roadbed out of order.

In the view we take of the case, it is not important that the men were transporting themselves from the point where the work was being done to the boarding cars, on hand cars furnished them by defendant. Their relation to the defendant, with respect to the question whether they were at the time in the discharge of their duties, is precisely the same as it would have been had they been going to the boarding cars in lumber wagons furnished by defendant under like circumstances, or had been going afoot. They would be as much in the discharge of their duties to defendant in the one case as in the other. If the statute in question can be construed to apply to a case of this kind, we are at a loss to know when the relation of master and servant ceases, so that the negligence of one servant towards a fellow servant will not render the master liable, or when

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or under what circumstances or conditions it may be said that the servant is not engaged in the duties of his employment.

We hold that the facts of this case do not bring it within the statute of Wisconsin above cited, and that during the journey to the boarding cars the employees were not, within its purpose and meaning, engaged in the discharge of their duties as such. They had ceased work, were not at the time subject to the orders or under the control of defendant, and, as between themselves at least, did not sustain the relation of servants of defendant engaged in the discharge of their duties. Whatever may be said of the rights of employees, similarly situated, with respect to the liability of the company for injuries negligently caused them by other employees who are at the time engaged in the actual work of their employment, it is clear that, as between themselves, and as to injuries caused by one to the other, they do not stand in the relation of employees engaged in the discharge of their duties.

The learned counsel for appellant cites no case in point. In Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 173, 36 N. W. 447, the plaintiff was a laborer riding on a construction train operated by, and under the control and management of, the company, and used expressly for the purpose of carrying laborers to and from their work, and was injured by reason of a defective track. The hand cars used by plaintiff and his fellow workmen were not operated or controlled by defendant, nor was its road defective. In Ewald v. Chicago, 70 Wis. 420, 36 N. W. 12, and 591, the plaintiff, who was employed in defendant's roundhouse as a wiper, was injured while in defendant's yard, on his way to work, by the negligence of switchmen in the actual and active discharge of their duties, and not, as in this case, by the negligence of an employee, who had ceased the actual discharge of his duties, and was going from his work to his boarding house. The other cases cited are similar. In all of them there was shown either a positive act of negligence on the part of defendant, or an act of negligence on the part of employees while in the actual discharge of their duties and work. No case is cited where the injury was caused by the negligent act of an employee committed after he had ceased the actual discharge of his duties,

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and was on his way to his home in company with the employee who was injured.

Order affirmed.

A. A. FIDER v. J. A. MANNHEIM.

December 12, 1899.

Nos. 11,774—(148).

Discharge in Bankruptcy.

Section 17 of the U. S. Bankruptcy Act of 1898 provides: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

Transfer of Debt—Original Creditor Named in Schedule.

Before defendant was adjudged a bankrupt he knew that the note here in suit had been transferred to plaintiff, but notwithstanding scheduled the note as held by the original payee, and no notice was given plaintiff in the bankruptcy proceedings.

Knowledge of Bankruptcy Proceeding.

But *held*, the evidence is conclusive that plaintiff had actual knowledge of such proceedings in time to prove his claim and have it allowed, and therefore the court did not err in holding that the note was barred by the subsequent discharge in bankruptcy and in ordering a verdict for defendant.

Action in the municipal court of Duluth to recover $126 and interest upon a promissory note. The case was tried before Edson, J., and a jury, and at the conclusion of the testimony the court granted defendant's motion to dismiss the action. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Austin N. McGindley, for appellant.

Pealer & Fesler, for respondent.

CANTY, J.

This is an action on a promissory note. The answer pleads a discharge in bankruptcy. On the trial the court ordered a dismissal

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of the action, and plaintiff appeals from an order denying a new trial. In 1895, defendant executed the note to the Homestead Building & Loan Association for $130. In October, 1898, the association transferred the note to plaintiff, and it being due, he demanded payment of the same from defendant. A few days afterwards, to-wit, on October 13, 1898, defendant was on his own petition adjudged a bankrupt by the United States district court in and for the district of Minnesota. About this time defendant paid plaintiff four dollars on the note. Defendant listed his debt in the bankruptcy proceedings as being held and owned by the loan association, and notice was given to it of the application for a discharge; but plaintiff was never listed as a creditor and no notice was given to him in the bankruptcy proceedings. Defendant was, by the judgment of that court entered on May 9, 1899, discharged from all his provable debts, and this discharge is pleaded in bar in the answer herein.

Section 17 of the bankruptcy law of 1898 (30 Stat. [U. S.] c. 541) provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

If it were not for the provision of the statute, the judgment of discharge would be conclusive on plaintiff whether he had notice or not. See In re Archenbrown, Fed. Cas. No. 504; Lamb v. Brown, Fed. Cas. No. 8,011; Brown v. Covenant, 86 Mo. 51.

The evidence is conclusive that before defendant filed his petition in bankruptcy he knew that plaintiff was the owner and holder of the note. But in our opinion the evidence is also conclusive that early in November, 1898, plaintiff knew that defendant had gone into bankruptcy and had not then been discharged. Plaintiff admitted repeatedly in his own testimony given on the trial that he was informed of the fact early in November by defendant and others. The evidence is conclusive that plaintiff had such knowledge. He also had ample time thereafter in which to prove his claim if he desired to do so and have it allowed, as the judgment of

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discharge was not entered until the following May. Then the trial court did not err in ordering a dismissal.

Order affirmed.

STATE v. THOMAS B. SCOTT.

December 12, 1899.

Nos. 11,860—(16).

Perjury—False Affidavit—Indictment.

An indictment for perjury, in making a false affidavit, charges that the accused "did wrongfully, unlawfully, knowingly, wilfully, falsely, corruptly, and feloniously swear and make oath" before a notary public that the affidavit (subscribed by him, and set out in the indictment) is true. *Held*, the indictment sufficiently charges that the accused was sworn to the affidavit.

Financial Report.

The affidavit purported to verify the truth of a statement which was referred to as the "foregoing statement * * * hereunto annexed, and by him [the affiant] subscribed." *Held*, the statement attached to and preceding the affidavit was thereby sufficiently identified, though not so subscribed.

Falsity of Parts.

Held, it is sufficiently charged that certain specified parts of the statement are false.

Indictment under Laws 1895, c. 175, § 104.

Held, the indictment (which was drawn under Laws 1895, c. 175, § 104) does not charge two offenses.

Defendant was indicted in the district court for Ramsey county for perjury, and demurred to the indictment. The court, O. B. Lewis, J., overruled the demurrer, and certified the case to the supreme court for its determination of the following points: (1) Whether the indictment conformed to G. S. 1866, c. 108, §§ 1, 2, 3, and 4, as qualified by section 10. (2) Whether the indictment charged more than one offense. (3) Whether the facts stated in the indictment constitute a public offense. Affirmed.

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Munn & Thygeson, for appellant.

The indictment does not allege that any oath on which perjury can be predicated was administered. There is no identified statement to which such alleged oath relates on which perjury can be predicated. What defendant did should be set forth. An oath, and the form of oath required by the statute, must have been administered; and the indictment must recite that the oath was administered. People v. Dunlap, 113 Cal. 72; U. S. v. McConaughy, 33 Fed. 168; State v. Divoll, 44 N. H. 140. The form of oath required by the statute must be substantially followed. See cases supra; Ashburn v. State, 15 Ga. 246; Bawcom v. State, 41 Tex. 189; Sutton v. State, 41 Tex. 513; Gorman v. State, 42 Tex. 221.

W. B. Douglas, Attorney General, *Horace E. Bigelow*, and *F. W. Zollman*, for the State.

CANTY, J.

The grand jury of Ramsey county returned an indictment against the defendant charging him with the crime of perjury. He demurred to the indictment. The court overruled the demurrer, and certified the case to this court.

The indictment charges that on February 3, 1897, the defendant was president of the Life Insurance Clearing Company, a corporation organized under the laws of this state, and doing a life insurance business; that on that day he made oath to the return to the insurance commissioner, such return being the annual statement of the condition, business, and affairs of said company, for the year ending December 31, 1896; and that certain specified portions of this statement are false.

Laws 1895, c. 175, § 74, provides:

"Every insurance company doing business in this state must transmit to the insurance commissioner a statement of its condition and business for the year ending on the 31st day of December."

The section then provides for publishing the statement, and further provides:

"Statements for publication shall be made out on blanks furnished by the insurance commissioner, and under his direction."

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Section 104 provides:

"For wilfully making a false annual or other statement it is required by law to make, an insurance company and the persons making oath to or subscribing the same shall severally be punished by a fine of not less than one hundred nor more than five thousand dollars. Any person making oath to such false statement shall be deemed guilty of the crime of perjury."

The indictment further charges:

"At said city of St. Paul, Ramsey county, Minnesota, on the third day of February, A. D. 1897, the said Thomas B. Scott, then and there being, did wrongfully, unlawfully, knowingly, wilfully, falsely, corruptly, and feloniously swear and make oath before one Ed. H. Irwin, then and there a duly appointed, qualified, and acting notary public within and for Ramsey county, Minnesota, the said Ed. H. Irwin then and there having lawful authority to administer such oath, and the same being an occasion upon which an oath is and was by law required; that a certain statement and affidavit, in writing, by him, the said Thomas B. Scott, subscribed, being, and purporting to be, the annual statement of the condition and affairs of said Life Insurance Clearing Company for the year ending December 31, 1896, to the insurance commissioner of the state of Minnesota, and which said statement said Life Insurance Clearing Company was required by law to make, transmit to, and file with the insurance commissioner of the state of Minnesota, and did make and transmit to and file with said insurance commissioner of the state of Minnesota, and which said statement said Thomas B. Scott then and there subscribed and swore to with the intent that it be uttered, published, transmitted, and delivered to the insurance commissioner of said state of Minnesota as true, was and is true; which said statement and affidavit is in the words and figures as follows."

Then follows the statement, which is headed,

"Gain and Loss Exhibit of the Life Insurance Clearing Co. for the Year 1896."

The first subhead is as follows:

"Annual statement for the year ending December 31, A. D. 1896, of the condition of the Life Insurance Clearing Co., organized under the laws of the state of Minnesota, made to the insurance commissioner of the state of Minnesota, pursuant to the laws of said state.

President, T. B. Scott.
Vice President, F. P. Strong.
Secretary, H. Burton Strait."

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Another subhead is as follows: "II. Income During Year 1896." The nineteenth item under this head is as follows:

(19) From all other sources, viz:			
Commission of			$289.63
For surplus fund.....	$12,500.00		
Real estate acquired.....	5,000.00		$17,500.00

Another subhead in the statement is as follows: "IV. Assets as per Ledger Accounts." The eighth item under this head is, "(8) Cash deposited in bank, $17,008.92." The next subhead is "V. Liabilities," and the fourteenth and sixteenth items under this head are as follows:

(14) Amount due by the company for borrowed money, including ($) interest due or accrued	(Nothing)
(16) Amount of any other liability of the company, viz. premiums paid in advance, $	(Nothing)

(It sufficiently appears from the fact that no amount was placed opposite either of these items in the column of figures—footed up under each head—that it was intended by the statement to make it appear that there was no liability of the character mentioned in either of these two items.) After giving a number of items under the seventh subhead, and some miscellaneous items, the statement contains the following affidavit:

"State of Minnesota, County of Ramsey—ss.: Thos. B. Scott, president, and H. Burton Strait, secretary, of the Life Insurance Clearing Co., being duly sworn, depose and say, and each for himself says, that they are the above-described officers of the said company, and that on the thirty-first day of December last all of the above-described assets were the absolute property of the said company, free and clear from any liens or claims thereon, except as above stated; and that the foregoing statement, with the schedules and explanation hereunto annexed and by them subscribed, are a full and correct exhibit of all the liabilities, and of the income and disbursements, and of the general condition and affairs of the said company, on the said thirty-first day of December last, and for the year ending on that day, according to the best of their information, knowledge, and belief, respectively.

Thos. B. Scott,
H. Burton Strait.

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Subscribed and sworn to before me, this 3d day of February, A. D. 1897. Ed. H. Irwin,
Notary Public,
Ramsey Co., Minn.

[Notarial Seal, Ramsey Co., Minn.]"

The statement then gives some further items, not here material, and then the indictment charges as follows:

"And which said statement was then and there wilfully, knowingly, and corruptly false, as he, the said Thomas B. Scott, then and there well knew. That in truth and in fact the said Life Insurance Clearing Company did not, at the close of business on said 31st day of December, A. D. 1896, or at all on said day, or at the time of the making of said statement, or the making of oath thereto, have, own, or possess resources or assets of the kind designated in said statement as item 19. From all other sources, viz.: For surplus fund, $12,500.00,' of Schedule 'II, income during 1896,' and did not have or receive at all during the year 1896 the sum of twelve thousand five hundred (12,500) dollars, or any other sum whatsoever, for surplus fund, nor did the said Thomas B. Scott have or possess any knowledge, information, and belief, or either, nor did the said Thomas B. Scott believe, that the said Life Insurance Clearing Company did, at the close of business on December 31st, 1896, or at all on said day, or at the time of the making of said statement, or the making of oath thereto, have, own, or possess, or receive, during said year of 1896, the sum of twelve thousand five hundred dollars ($12,500.00), or any other sum whatever, for surplus fund; all as he, the said Thomas B. Scott, then and there well knew.

"That in truth and in fact the said Life Insurance Clearing Company did not, at the close of business on said 31st day of December, A. D. 1896, or at all on said day, or at the time of the making of said statement or the making of oath thereto, have, own, or possess resources or assets of the kind designated in said statement as item '8, cash deposited in banks, $17,008.92,' of Schedule 'IV. Assets as per Ledger Accounts,' and did not have said sum of seventeen thousand and eight dollars and ninety-two cents ($17,008.92), or any other sum whatever, deposited in bank or banks, or at all, except the sum of four thousand five hundred and eight dollars and ninety-two cents ($4,508.92), nor did the said Thomas B. Scott have or possess any knowledge, information, and belief, or either, nor did the said Thomas B. Scott believe, that the said Life Insurance Clearing Company did, at the close of business on December 31st, 1896, or at all on said day, or at the time of the making of said statement or at the making of oath thereto, have, own, or possess said sum of seventeen thousand and eight dollars and ninety-two cents ($17,008.92), or any other sum whatsoever deposited in bank or banks, or at all,

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except the sum of four thousand five hundred and eight dollars and ninety-two cents ($4,508.92), all as he, the said Thomas B. Scott, then and there well knew.

"That in truth and in fact the said Life Insurance Clearing Company did, at the close of business on December 31st, 1896, and on December 31st, 1896, and at the time of the making of said statement, and at the making of oath thereto, have total policy claims under Schedule 'V. Liabilities,' of said statement, to the amount of twenty thousand nine hundred and ninety-three dollars and twelve cents ($20,993.12), and did on said 31st day of December, A. D. 1896, and at the close of business on said day, and at the time of the making of said statement, and the making of oath thereto, have liabilities in unpaid death claims, for the year ending December 31, 1896, in the sum of twenty thousand nine hundred and ninety-three dollars and twelve cents ($20,993.12); all as he, the said Thomas B. Scott, then and there, when he made oath to said statement as aforesaid, well knew and believed. That in truth and in fact the said Thomas B. Scott, when he made oath to said statement as aforesaid, did not have or possess any knowledge, information, or belief, or either, nor did he, the said Thomas B. Scott, believe, that the said Life Insurance Clearing Company did, at the close of business on the said December 31st, 1896, or at all on said day, or at the time of the making of said statement, or the making of oath thereto, have liabilities in unpaid death claims in any less sum than said sum of twenty thousand nine hundred and ninety-three dollars and twelve cents ($20,993.12); but he, the said Thomas B. Scott, did then and there well know and believe that the liabilities of said Life Insurance Clearing Company in unpaid death claims were then and there, and on December 31st, 1896, and at the close of business on said 31st day of December, 1896, the sum of twenty thousand nine hundred and ninety-three dollars and twelve cents ($20,993.12).

"That in truth and in fact the said Life Insurance Clearing Company did on said December 31st, 1896, and at the close of business on said day, have liabilities, of the character designated in items '14' and '16' of 'V. Liabilities,' of said statement, in and to an amount exceeding the sum of twelve thousand dollars, as he, the said Thomas B. Scott, then and there, when he made oath to said statement, well knew and believed. That in truth and in fact the said Thomas B. Scott, when he made oath to said statement, as aforesaid, did not have any knowledge, information and belief, or either, nor did he, the said Thomas B. Scott, believe, that the said Life Insurance Clearing Company had liabilities of the character designated in items '14' and '16' of 'V. Liabilities,' of said statement, in any less sum than the sum of twelve thousand dollars, but he, the said Thomas B. Scott, did then and there know and believe that the said Life Insurance Clearing Company did, on December 31st, 1896, and

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at the close of business on said day, have liabilities of the character designated in items '14' and '16' of 'V. Liabilities,' of said statement, in a sum and amount exceeding the sum of twelve thousand dollars; all as he, the said Thomas B. Scott, then and there well knew; all of which said matters and statements, and each and all thereof, so made oath to and sworn to by the said Thomas B. Scott, were then and there material in and upon said inquiry into the condition and affairs of the said Life Insurance Clearing Company, before and within the jurisdiction of the insurance commissioner of the state of Minnesota, and all of which said matters and statements, and each of them, and the matters and statements so made oath to, and sworn to by the said Thomas B. Scott, as aforesaid, were then and there wilfully, knowingly, and corruptly false, as he, the said Thomas B. Scott, then and there well knew."

1. Defendant contends that it is not sufficiently charged in the indictment that any oath was administered to the defendant upon which perjury can be predicated. G. S. 1894, § 5641, gives the form for "oath of persons signing affidavits, verifications and other papers," as follows:

"You do solemnly swear that the contents of this affidavit, (verification or paper,) by you subscribed, are true, as therein stated. So help you God."

We cannot hold that, as defendant seems to contend, the indictment should charge in so many words that this form was administered when the oath was taken. It was not necessary, under the common law, to charge in the indictment that when the oath was administered the words, "So help you God," or any other set of words, were used. It was sufficient to charge that the accused "was in due manner sworn and did take his corporal oath" (2 Chitty, Crim. L. 432); "was sworn and took his corporal oath" (Id. 439, 440, 443); "did then and there take his corporal oath and was sworn" (Id. 445). True, these forms are placed in among other forms, in which the words, "duly sworn," or "was in due manner sworn," are used, but the authorities do not seem to attach any great or controlling efficacy to the word "due" or "duly" in such connection. The form for an indictment for perjury given by our statute is as follows:

"On his examination as a witness, duly sworn to testify the truth, on the trial of a civil action in the court of ————, between C. D.,

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plaintiff, and E. F., defendant, which court had authority to administer such oath, he testified falsely, that (stating the facts to be alleged to be false,) the matters so testified being material, and the testimony being wilfully and corruptly false." G. S. 1894, § 7239, Form No. 24.

Section 7247 provides:

"The indictment is sufficient if it can be understood therefrom: * * *

Sixth, That the act or omission charged as the offense is clearly and distinctly set forth, in ordinary and concise language."

The indictment in this case charges that the accused,

"Then and there being, did wrongfully, unlawfully, knowingly, wilfully, falsely, corruptly, and feloniously swear and make oath before * * * [the notary] that a certain statement and affidavit * * * by him * * * subscribed * * * was and is true."

In our opinion, this charges sufficiently, and with sufficient positiveness, that defendant was duly and legally sworn to the affidavit, and that the allegations above quoted are not a mere conclusion.

2. It is further claimed that the affidavit sworn to and subscribed by defendant does not identify any statement or report as the one referred to in his affidavit. The statement which immediately precedes the affidavit is not signed by either this defendant, or by Strait, the secretary. But, as will be observed, the affidavit refers to "the foregoing statement, with schedules and explanations hereunto annexed, and by them [the affiants] subscribed." Counsel contend that, as neither the statement, schedules, nor explanations were so subscribed, there is nothing identified to which the affidavit relates. We cannot so hold. The words, "by them subscribed," may be rejected as surplusage or false description, and there is still sufficient remaining to identify the documents to which the affidavit refers. They are the "foregoing" documents, "hereunto annexed," and it sufficiently appears that they preceded and were so annexed to the affidavit.

3. It will be observed that item 19 of the statement contains these entries: "For surplus fund, $12,500; real estate acquired, $5,000; [total], $17,500." There is nothing in the claim that it does not

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appear from the statement or affidavit that this surplus fund and this real estate were acquired during the year 1896. The subhead under which these items appear is entitled, "Income During the Year 1896," and the affidavit states that the "foregoing statement," schedules, etc.,

"Are a full and correct exhibit of all the liabilities, and of the income and disbursements, and of the general condition and affairs, of said company on said 31st day of December last, and for the year ending on that day."

Counsel further contend that, as to item 9 above quoted, "Cash deposited in bank, $17,008.92," the indictment merely negatives the assertion that this money was in the bank, and not the assertion that it actually existed at the time as an asset of the company. We cannot so hold. The indictment states that the company did not have that sum, "or any other sum whatever, deposited in bank or banks, or at all, except the sum of $4,508.92."

4. Neither can we hold that, under said section 104, the indictment charges two offenses,—one for making a false annual statement, and the other for committing perjury. As alleged in the indictment, the charge of making the false statement is mere matter of inducement, leading up to, and forming a part of, the crime of perjury, which is the one which the indictment charges. This disposes of all of the questions raised having any merit, and answers all the questions certified which were argued.

The order overruling the demurrer is affirmed.

COLLINS, J.

I dissent as to that part of the main opinion which holds that in the indictment it is sufficiently charged, and with sufficient positiveness, that the defendant was "duly and legally sworn to the affidavit." The language on which this conclusion is founded is that the accused did then and there wrongfully, etc., "swear and make oath." This manner of alleging what must appear in an indictment for perjury—that the accused was regularly sworn—is not in accordance with any of the forms prescribed in the text-books. Thus, we find: "Was sworn and took his corporal oath" (Wharton, Prec. Ind. 279, 285–320; 2 Chitty, Crim. L. 172–262; Archbold, Crim. Pl.

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312, 317, 318); "was in due manner sworn and took his oath" (Wharton, Prec. Ind. 284, 286, 294, 314); "was in due manner sworn and did make affidavit in writing and take his corporal oath" (Wharton, Prec. Ind. 290); "was in due manner sworn to make true answers" (Wharton, Prec. Ind. 291; 2 Chitty, Crim. L. 179); "was then and there duly sworn" (Wharton, Prec. Ind. 294, 316); "did take his corporal oath and then and there did swear" (Wharton, Prec. Ind. 300, 304; 2 Chitty, Crim. L. 202); "was legally sworn" (2 Swift, Syst. Laws Conn. 834); "took his solemn affirmation" (Wharton, Prec. Ind. 305); "took his corporal oath" (2 Chitty, Crim. L. 184, 189, 195, 258); "did take his oath" (2 Chitty, Crim. L. 185). Nor does it conform to the words used in G. S. 1894, § 7239, Form No. 24. And allegations, in substance the same, have been held insufficient in U. S. v. McConaughy (D. C.) 33 Fed. 168; People v. Dunlap, 113 Cal. 72, 45 Pac. 183. See also State v. Divoll, 44 N. H. 140.

CHARLES UNKE v. HENRY DAHLMIER and Others.

78 320
f79 361

December 12, 1899.

Nos. 11,898—(130).

Stepfather as Guardian—Use of Wards' Estate—Support of Wards.

A widow married a second husband, and he with a child by his former marriage, and she and her minor children by her former marriage, all resided on her homestead as one family. He was appointed guardian of her children, and for 10 years thereafter cultivated the farm, consisting of said homestead and other land belonging to her and her children, and still other land conveyed to him, but purchased with the money of her children. He apparently treated the crops of all of this land as his own, never kept any separate account of the crops or profits of any part of it, but the crops were mingled together, and the family were supported out of the common mass. There was no evidence as to what arrangement he had with his wife as to the cultivation of her part of the land, and he never made any arrangement with her as to who should support her children, or what funds should be applied for that purpose. In a proceeding to settle the guardian's account, *held* he was the head of the family, and a finding that the wife's children boarded with her and that she supported them during the 10 years is not sustained by the evidence.

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From an order of the probate court for Morrison county disallowing in part the final account of Charles Unke, as guardian of Henry Dahlmier and others, minors, the guardian appealed to the district court of said county. In the district court the appeal was tried before Baxter, J., who found that the wards were entitled to recover from the guardian the sum of $3,263.50; and from an order denying a motion for a new trial, the guardian appealed. Reversed.

George W. Stewart and *E. S. Smith*, for appellant.

Lindbergh & Blanchard and *E. P. Adams*, for respondents.

CANTY, J.

An appeal was taken from an order of the probate court settling the account of Unke, as guardian of the five Dahlmier children. On the trial in the district court, judgment was ordered against Unke in the sum of $3,263.50, and he appeals from an order denying a new trial.

In 1886, Henry Dahlmier died intestate, leaving his widow and four children surviving him. His fifth child was born shortly after his death. He left 160 acres of land, 80 acres of which was his homestead, so that his wife had a life estate in this 80 and an undivided one-third of the other 80. In June, 1887, the widow married the appellant, Unke, and thereafter he resided with her on her said homestead. Her five children resided with them, as also did a child of his own by a former marriage. On January 1, 1888, he was appointed guardian of her five children, and, as such guardian, received at that time promissory notes payable to the deceased amounting to $1,250, the same having come to the children as a part of their share of their father's estate. Some time afterwards, but just when does not appear, Unke collected the notes, and used the money to buy another 80 acres of land, the title to which he took in his own name. He cultivated this 80, and the Dahlmier 160, thereafter, until January 1, 1898, when he resigned or was removed as such guardian.

When he was appointed guardian, the oldest of the Dahlmier children was 10 years of age. They resided in the family during all of the time of said guardianship, except that in December, 1893, when the oldest boy was 16 years of age, he left the family home, and

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thereafter resided elsewhere. The district court ordered a judgment against Unke for the $1,250, and interest thereon at the rate of seven per cent. since he was appointed guardian. The court found that during all of the ten years of said guardianship he received a profit of $80 per year from the cultivation of said undivided two-thirds of said 80 acres which the five wards inherited from their father, and ordered judgment against Unke for those amounts also. He was allowed $25 for attorney's fees and some taxes that he had paid for the wards, but he was allowed nothing for the support, maintenance, or clothing of the wards, although he presented a claim therefor, and the main question which it is necessary to consider is whether the court erred in refusing to allow him anything therefor. The court found that during all of the 10 years of the guardianship the five wards "continued to live with her [their mother], as a part of her family, and to be supported by her," and for this reason the court refused to allow appellant anything for the support, maintenance, or clothing of the five wards.

In our opinion, the evidence does not sustain the finding above quoted. The evidence is that appellant, his child, his five stepchildren, and his wife all lived together as one family; that he cultivated the Dahlmier 160 acres and said other 80 acres; apparently treated all of the crops raised on all of this land as his own; never kept any account of the amount produced or the amount of the profit realized from any particular part of the land; and supported and maintained the family out of the produce of all of the land, regardless of whether it came from one part of the land or another. While the evidence on these points is very meager, it is uncontradicted, and, in our opinion, will not support the finding made. As his son and his stepsons grew old enough to do so, they assisted him in the cultivation of all the different parts of the farm. The evidence is wholly silent as to what arrangement or agreement he had with his wife under which he cultivated her share of the land, and there was no express agreement between them as to whose means should be used to support her five children.

On this evidence, it must be held that appellant was the head of the family. A widow, on her marriage to a second husband, is not

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liable for the support of her minor child, but is entitled to have its income applied thereto (In re Besondy, 32 Minn. 385, 20 N. W. 366), and, whether the evidence would sustain a finding that the five wards were supported by funds and produce furnished partly by the mother and partly by the stepfather, we will not consider; no such finding is made. In Hazlett v. Babcock, 64 Minn. 254, 66 N. W. 971, the husband raised crops on his wife's land, and we held that, on the evidence in that case, it was a question for the jury whether the crops belonged to the husband or the wife. Conceding, without deciding, that the evidence in this case warranted a finding that all of the crops raised on the wife's land belonged to her, still it cannot be held on the evidence that the five wards were supported and maintained wholly from these crops, as all of the crops on all of the land were mingled together, and the family was supported from the common mass.

Again, conceding that the evidence would warrant a finding that appellant was in loco parentis to these five wards, that he received them into his family under circumstances such as to raise a presumption that he intended to support them gratuitously (see In re Besondy, supra), still there is no finding to that effect, and the evidence is certainly not conclusive that he intended to support them gratuitously. As the evidence will not support the finding above quoted, a new trial must be granted. In our opinion, it sufficiently appears by the settled case that it contains all the evidence.

Order reversed, and a new trial granted.

JAMES E. GRAY v. TIMES NEWSPAPER COMPANY.

78 32
81 33

December 14, 1899.

Nos. 11,788—(135).

Libel—Verdict Excessive.

In an action for libel, *held*, on the evidence, the trial court was warranted, in its discretion, in setting the verdict aside as excessive, and granting a new trial.

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Action in the district court for Hennepin county to recover $15,000 damages for libel. The case was tried before Brooks, J., and a jury, which rendered a verdict in favor of plaintiff for $1,800; and from an order granting a motion for a new trial, plaintiff appealed. Affirmed.

H. V. Mercer, for appellant.

A. B. Jackson, for respondent.

CANTY, J.

This is an action for libel. For the three publications: First, plaintiff's version of the "hold up"; second, the libel; and, third, the attempted retraction—see the opinion on the former appeal. 74 Minn. 452, 77 N. W. 204. After the case was remanded on the former appeal, it was again tried, and the jury returned a verdict for plaintiff for the sum of $1,800. The trial court granted a new trial on the ground that the verdict is excessive, and plaintiff appeals from the order granting the motion.

In our opinion, the verdict is clearly and manifestly excessive, and the order appealed from should be affirmed. Plaintiff was a university student, who at the time of the publication of the libel had resided in Minneapolis about a month or six weeks. The publication did not materially injure him in his business or profession, because he had no business or profession in which it could or would do so. He was entitled to some damages for injury to his feelings, shame, and loss of the good opinion of his fellows, and injury to his standing in the community; but clearly $1,800 is excessive, as compensation for those injuries.

But it is not necessary to consider whether the amount awarded is so excessive that the trial court was bound to cut it down or grant a new trial. To say the least, the court did not abuse its discretion in granting a new trial on the ground that the verdict is excessive. The defendant attempted promptly to retract the libel, and did not plead or attempt to prove the truth of the same. The court was amply warranted in holding that the defendant was not actuated by express or actual malice. Plaintiff took a loaded revolver with him, and went on his bicycle out on a lonesome road in the evening, where he had no business in particular. He met with

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a rather unusual adventure, and his story, on its face, did not appear altogether probable. Of course, the newspaper reporter was not justified in acting on his mere suspicions; but the fact that plaintiff's story was somewhat suspicious and improbable tends to mitigate the offense of publishing the libel, at least to the extent of warranting the trial judge in holding, in his discretion, that he would not permit a verdict to stand for any considerable amount of punitive damages.

Order affirmed.

CORNELIA DE CAMP KITTSON and Others v. ST. PAUL TRUST COMPANY.

December 14, 1899.

Nos. 11,827—(145).

Executor and Administrator—Annual Accounts.

Held, an intermediate accounting in the probate court by an executor or administrator is conclusive on all of those contesting it who were under no disability, and on all of those under disability who were properly represented by guardians.

Partial Account Conclusive, after Hearing.

Several intermediate accountings were made by the executor, at the last of which the appellant devisees appeared and contested. The court made an order allowing the account, and adjudging that a certain sum was due on a certain day from the executor to the estate. This was based on the amount found due, and allowed on the prior accountings. *Held*, the last accounting was conclusive on the appellants, and, as it involved the prior accountings, it made them conclusive also.

Final Account.

On the attempt made in the final accounting to open up these prior accountings, *held*, the showing made was not sufficient.

Petitions to the probate court of Ramsey county by Cornelia de Camp Kittson, Hercules L. Kittson, and Daniel Murphy, as guardian of Norman W. Kittson and another, minors, and by Violet K. Kittson, as guardian of Alfred S. Kittson, incompetent, praying that the accounts of the St. Paul Trust Company, as executor of the estate

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of Norman W. Kittson, deceased, be re-opened, and that the executor be compelled to amend its final account so as to include all previous accounts. From an order denying the prayer of petitioners, they appealed to the district court for said county. In the district court the appeals were heard before Brill, J., who made an order affirming the order of the probate court, from which order petitioners appealed. Affirmed.

Daniel Murphy and *John F. Fitzpatrick*, for appellants.

There is no provision for adjudication on a partial account of an executor. The provisions of the probate code refer solely to final accounts. G. S. 1894, §§ 4639–4641. Section 4638 gives the probate court power to call on an executor to give an account at any time, but this can only be construed in furtherance of the general power of the court to keep watch over administration. There is no provision for notice or hearing on such a partial account. There is no good reason why there should be a final adjudication on a partial account. The rule elsewhere is that orders on partial accounts shall not be final judgments, but that all matters may be inquired into on final accounting. Picot v. O'Fallon, 35 Mo. 29; Folger v. Heidel, 60 Mo. 284; Seymour v. Seymour, 67 Mo. 303; Jackson v. Reynolds, 39 N. J. Eq. 313; Leake v. Leake, 75 Va. 792; West v. West, 75 Mo. 204; Mix's Appeal, 35 Conn. 121; Coburn v. Loomis, 49 Me. 406; Scott v. Fox, 14 Md. 388, 397; Sewell v. Slingluff, 62 Md. 592; Wilson v. McCarty, 55 Md. 277; In re Stratton, 46 Md. 551; Matter of Stayner, 33 Oh. St. 481; Long v. Thompson, 60 Ill. 27; State v. Wilson, 51 Ind. 96.

Harvey Officer, for respondent.

CANTY, J.

Norman W. Kittson died leaving a last will, which was duly probated, and the St. Paul Trust Company, a corporation, was appointed executor. The executor has since been in the habit of filing accounts about once a year, and having them allowed by the probate court.

The first account was filed in January, 1890, and purported to be a statement of all the receipts and disbursements of the executor

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up to January 10, 1890. On February 14 following, the probate court made an order allowing the account.

The second account was filed October 7, 1891, and purported to be a statement of the receipts and disbursements from January 10, 1890, to June 30, 1891. On November 3 of that year the court made its order allowing that account. Service of the notice of the hearing of each account was made on all of these appellants, both by publication and personally, as ordered by the court.

The third account was filed in March, 1893, and purported to be an account of all the receipts and disbursements of the executor during the time from June 30, 1891, to March 1, 1893. The court fixed April 11, 1893, as the time of hearing this account. Thereupon the appellants Norman Kittson and Cornelia de C. Kittson, devisees under the will, appeared and objected to the account. After a hearing, the court charged the executor with $22,286.49 more than it admitted by the account to be due the estate, and allowed the account accordingly. The executor and the objectors appealed to the district court, and the latter court, after a hearing, made its order in the matter modifying the order of the probate court. Each party moved for a new trial, and appealed to this court from an order denying the same. This court modified the order of the district court, and remanded the case, with directions to the district court. See 62 Minn. 408, 65 N. W. 74. These directions were complied with by the district court. The case was again appealed to this court, the order appealed from affirmed, and the case remanded. See 67 Minn. 59, 69 N. W. 625. The case was subsequently remanded to the probate court. The accounting came on again for hearing in that court on April 29, 1897. Said objectors then appeared by their attorney, and Alfred S. Kittson, a spendthrift, by his guardian, also appeared by attorney, and filed similar objections. Thereupon the court, pursuant to the judgment of the district court, allowed the account, charging the executor $13,567.70 in addition to what it admitted in its account was due the estate. But the order further provided that the account is "settled and allowed subject to revision on final accounting."

Pending the litigation over the third account, to wit, on January 1, 1894, the executor filed its fourth account, purporting to be a

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statement of all the receipts and disbursements of the estate during the time from March 1, 1893, to January 1, 1894. The hearing on that account was set for January 26, 1894, and all of these appellants except Alfred S. Kittson appeared, and filed objections to the account. Thereupon the hearing was continued from time to time, awaiting the result of said litigation over the third account. The fourth account finally came on for hearing on June 10, 1897. Alfred S. Kittson then appeared by the attorney of his guardian, and filed objections. The other objectors also appeared. The hearing was had, and the probate court made its order reciting the fact that the third account had been settled as aforesaid, and, on the basis of the balance found due on the settlement thereof, found on said fourth accounting and adjudged that there was due from the executor to the estate, on December 20, 1893, the sum of $54,846.49 "and that said balance of $54,846.49, due by said executor to said estate, shall be and become the first item to be credited to said estate as of December 30, 1893, in the next [fifth] accounting of the said executor in the matter of said estate." No appeal has ever been taken from this order.

In the meantime the executor had filed its fifth account, and thereafter, prior to November 25, 1898, it had filed its sixth, or final, account. These two accounts came on for examination on that day, and thereupon these appellants, devisees under the will, appeared and filed petitions, in which they ask that all of the prior accounts be reopened, and that the executor be compelled to amend its final account so as to include therein all the others.

The petition alleges that during the time covered by the prior accounts the executor handled for the estate a large sum of money,

"Which money said executor used as its own money, and loaned the same out to divers persons, and charged interest on the same, which it has misappropriated and fraudulently converted, and kept the same for its own use and benefit, and that the said executor has not accounted for the commissions earned on account of loaning said moneys of said estate of said deceased, but has fraudulently kept the same for its own use; and that the sums so kept, used, and converted and misappropriated amount to many thousands of dollars, which fact did not come to the knowledge of these petitioners until after the contesting of said third account."

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The petition further alleges that

"During all the time covered by said accountings the said executor commingled all the moneys belonging to said estate of said deceased with moneys belonging to itself and to other estates, and kept the same in its private account in the different banks of St. Paul and otherwheres, and drew said moneys so commingled on its individual checks, and loaned the same to divers persons and corporations, and received large amounts of interest as aforesaid on loans made out of said moneys so commingled, and so held in its individual capacity, and not accounting for the same in any of its accounts; and also drew checks in its individual name on said funds, paid salaries of its officers, dividends to its stockholders, rents and taxes on its own property, and in fact used such commingled funds as its individual funds; that by so appropriating said moneys, and converting the same as aforesaid, and keeping the interest on the investments of said moneys, the said St. Paul Trust Company, as executor, committed fraud against said estate of said deceased, in the administration thereof, to the great injury of your petitioners; * * * that the said St. Paul Trust Company, as executor, has wrongfully and fraudulently collected and kept fees for administering said estate the following amounts: During the first accounting the sum of $14,225, during the second accounting the sum of $24,200 (which sum, by order this probate court, disallowed, in part, allowing the net charge to remain at $16,650); that during said third account the sum of $10,000; that during the fourth account the sum of $5,000."

The petition of Alfred S. Kittson, by his guardian, further alleges that, during the time covered by the first, second, and third accounts filed by the executor, he was a minor, under the age of 21 years, and this executor, the St. Paul Trust Company, was his guardian. These are all of the allegations of the petitions that we deem it necessary to quote.

To these petitions the executor filed an answer, which consists partly of objections to the sufficiency of the petitions, and partly of an answer to them on the merits. The order of the court denying the prayer of these petitions appears in the record. This order recites that the fifth and sixth accounts came on for hearing,

"And thereupon, on said date, the said several petitioners, by their said respective attorneys, and the said attorney for said executor, submitted the said several petitions, and the said answers thereto, to this court, and the same were by it taken under advisement;

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* * * and now, having duly considered the said several petitions, and the said answers thereto, and it appearing to the satisfaction of the court, from an inspection and examination of its files, that, upon the final examination and allowance of the fourth account of said executor, named in said petitions and answers, all the said petitioners were duly represented upon the settlement and allowance thereof, and had due opportunity to be heard therein, and that they had due opportunity to appeal from such settlement and allowance, and did not appeal therefrom, and that the settlement of said fourth account was made upon the basis of the settlement of the third account, which had been settled by this court pursuant to the orders of the district court for said Ramsey county, and having duly considered the matters alleged in the said several petitions, and the said answers thereto, it is now ordered that the said prayers of said several petitions be, and the same are hereby, denied."

From this order the petitioners appealed to the district court, and the order of that court affirming the order of the court below appears in the record as follows:

"After hearing counsel for respective parties, and upon the return of the probate court, and the amended return, and all the records and files, it is ordered that the motion of respondent, the St. Paul Trust Company, for the affirmance of the order of the probate court, be granted; and it is ordered that judgment be entered affirming the order of the probate court appealed from."

From the judgment entered on this order the petitioners appeal to this court.

One of the questions raised by the parties is as to the conclusiveness of intermediate accountings by the executor during the progress of administration. It is generally held that when such accountings are ex parte, or when the beneficiaries are minors not properly represented, such intermediate accountings are only prima facie evidence of their correctness. See the cases cited in 11 Am. & Eng. Enc. (2d Ed.) p. 1310, note 6. Some of the cases also hold that such an accounting is conclusive only against those who actually contest it. Id. In our opinion such an accounting is conclusive on all of those contesting it who were not under disability, and on all of those under disability who were properly represented by guardians. Id. 1311; Mercer v. Hogan, 4 Mackey, 520; Turney v. Williams, 7 Yerg. 171, 211, 15 Tenn. 171, 211; Duke v. Duke, 26

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Ala. 673. On the fourth accounting all of the appellants contested the administrator's account, and all of those who were under disability were properly represented by their guardians and the attorneys of the latter. (The respondent trust company had long since ceased to be the guardian of Alfred S. Kittson.)

Then, in our opinion, the order made on the fourth accounting is conclusive. Conceding, without deciding, that none of the prior accountings were in themselves conclusive against those appellants, still the fourth accounting is conclusive that on December 30, 1893, there was due to the estate from the executor the sum of $54,846.49 —no more, no less. This accounting is based upon all the others, necessarily involves them, and has the effect of rendering them conclusive also. Then, in order to set aside these prior accountings, the appellants should have made a strong, clear, and satisfactory showing, not only as to the merits, but also as to some proper and sufficient excuse for their laches, and for their failure to proceed to open up the accountings prior to the fourth, before the final order was entered in that accounting. It is clear, from what has been recited above, that appellants made no such showing. Their showing as to the merits is very general, and rather vague, and they offered no excuse at all for their laches, and for their failure to attempt to open up the accountings prior to the fourth before the final order was entered in that accounting.

The judgment appealed from is therefore affirmed.

STATE ex rel. CITY OF ST. PAUL v. ST. PAUL CITY RAILWAY COMPANY.

78 331
80 116

December 15, 1899.

Nos. 11,686—(10).

City of St. Paul—Use of Streets by Street Railway—Ordinances.

A municipality cannot abdicate or barter away, at least without express legislative authority, its governmental powers conferred upon it for public purposes. Hence any authority to use the streets granted to a street-railway company must be construed as being subject to the general

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police power of the municipality over the public streets. Section 18 of Ordinance No. 1227 of the city of St. Paul, known as the "General Electric Ordinance," construed, and *held*, that the power therein reserved to the common council to order the St. Paul City Railway Company to extend any existing or future lines of its railway is not limited to extensions on streets or parts of streets not provided with any car service, but authorizes the extension of the car service of one line to or into the business or central part of the city, over streets or parts of streets upon which there is an existing track upon which the cars of another line are already operated.

Alternative writ of mandamus from the district court for Ramsey county directing defendant to extend its lines of street railway in accordance with Ordinances Nos. 1925 and 1227 of relator and to operate its cars thereon or to show cause why it should not be done. The case was tried before Bunn, J., who found in favor of defendant and directed the writ to be dismissed. From an order denying a motion for a new trial, relator appealed. Reversed.

James E. Markham, for appellant.

Ordinance No. 1925 is valid as a proper exercise of the power reserved by Ordinance No. 1227, § 18. Ordinance No. 1925 is furthermore a proper exercise of the police power of the city, and should be sustained as such. In determining what regulations are reasonable and necessary in the exercise of the police power, much must be left to the judgment and discretion of the common council. When they have exercised their judgment and discretion in passing an ordinance, it is prima facie valid; and to justify a court in setting aside their action its unreasonableness and want of necessity as a measure for protection of the interests of the public must be clearly manifest, and it must amount to an abuse of discretion or a mere arbitrary exercise of power. Evison v. Chicago, St. P., M. & O. Ry. Co., 45 Minn. 370; Knobloch v. Chicago, M. & St. P. Ry. Co., 31 Minn. 402; People v. Detroit, 116 Mich. 132. Where a business is a proper subject of police regulation, the legislature may adopt any measures they see fit, provided they adopt such as have some reasonable relation to, and tendency to accomplish, the desired end; in which case the courts will not assume to determine whether the measures are wise,

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or the best that might have been adopted. State v. Donaldson, 41 Minn. 74; Rippe v. Becker, 56 Minn. 100; Mayor v. Dry Dock, 133 N. Y. 104; Milwaukee E. Ry. & L. Co. v. City of Milwaukee, 87 Fed. 577, 578. By the city charter (chapter 4, § 3), the legislature has conferred on the common council power to make this regulation and to adopt all needful measures for protection of the public interests. The laws of the city, by way of ordinance and resolution, on subjects named and within the powers delegated by that section, are as effectual as if they emanated directly from the legislature. City of St. Paul v. Smith, 27 Minn. 364, 366; State v. Robinson, 42 Minn. 107.

The charter confers on the common council "the care, supervision, and control of all the public highways, bridges, streets, alleys," etc.; authority to ordain such ordinances as shall be deemed expedient "for the good government of the city, the protection of its property, the preservation of peace and good order, the suppression of vice, and the benefit of trade and commerce"; and authority to regulate * * * hacks, carts * * * and other vehicles, etc. These provisions amount to a grant of police power, including the right to regulate travel in the public streets. State v. Robinson, supra. The company's cars are vehicles within the term of the charter. City of Duluth v. Mallett, 43 Minn. 204. See Frankford v. City, 58 Pa. St. 119; Mayor v. Third Ave., 117 N. Y. 404; Milhau v. Sharp, 17 Barb. 435; State v. Herod, 29 Iowa, 123. The imposition of the duty of supervision and control of the streets is a sufficient grant of power to adopt all needful ordinances for regulation of travel in the streets. Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11. See Horr & B., Pol. Ord. § 30.

All contracts of municipal corporations not authorized by charter are void. 1 Dillon, Mun. Corp. (4th Ed.) § 89; Spaulding v. City, 23 Pick. 71. The only express power granted with reference to street railways is found in Sp. Laws 1889, c. 37. Even if this provision applies to electric railways, intention to authorize the city to contract for a period of years will not be inferred. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666. The manifest purpose of the ordinance authorizing the company to lay tracks, etc., was to confer the exclusive right of carrying passengers for profit on these

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streets. Davis v. Mayor, 14 N. Y. 506, 516. The grant of a practical monopoly and of an easement in the streets beyond the power of the city to recall or to regulate ought not to be inferred, unless the language of the grant clearly authorizes the making of such a contract. Richmond v. Town, 59 N. Y. 228; Long v. City of Duluth, 49 Minn. 280; City v. Danville, 178 Ill. 299; South Covington v. Berry, 93 Ky. 43; City of Detroit v. Detroit C. Ry. Co., 56 Fed. 867. The contract is not authorized under the head of governmental powers. The ordinance is at most effective as a mere license. Nash v. Lowry, 37 Minn. 261.

Even if the ordinances were in the nature of contracts within the power of the city to make, the company must be deemed to have accepted them with knowledge that the city had power to legislate by ordinance as to streets and highways, and to make all needed regulations for convenient enjoyment of the same by the citizens; and the company is bound by an implied agreement to hold its privileges subject to proper exercise of the police power. The legislature cannot deprive itself by contract of the right to pass such laws as are necessary for the general welfare of the public. Flynn v. Little Falls E. & W. Co., 69 Minn. 180; City v. Fort Wayne, 95 Mich. 456; Sternberg v. State, 36 Neb. 307; West Philadelphia v. City, 10 Phila. 70; South Covington v. Berry, supra; Frankford v. City, supra; City v. Navin, 151 Ind. 139; City v. McKeesport, 2 Pa. Supr. Ct. 242; People v. Boston, 70 N. Y. 569; State v. City, 59 N. J. L. 396; Munn v. Illinois, 94 U. S. 113; Fertilizing Co. v. Hyde Park, supra; Sioux City St. Ry. Co. v. Sioux City, 138 U. S. 98; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57; Michigan Tel. Co. v. City of Charlotte, supra. See also Rippe v. Becker, supra; Sinking Fund Cases, 99 U. S. 700, 747; Stone v. Mississippi, 101 U. S. 814, 819; Corporation v. Mayor, 5 Cow. 538; Wabash R. Co. v. Defiance, 167 U. S. 88; 1 Dillon, Mun. Corp. § 97; Elliott, Roads & S. 573. In any case, such a contract, by which the hands of the city would be tied fast for 50 years, would be unreasonable, and beyond the power of its officers to make. Flynn v. Little Falls E. & W. Co., supra.

Munn & Thygeson, for respondent.

Ordinance No. 1925 is not authorized by Ordinance No. 1227.

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Ordinance No. 1227 and the other ordinances appearing in the record constitute a contract, the full nature and extent of which it is not necessary to determine in this case. That issue was not presented below, and consideration of other ordinances and evidence are necessary to its determination. Should the court deem it necessary to consider the question, the following provisions of the charter and authorities are referred to. Section 1 of the charter provides that the city shall be capable of contracting, and shall have the general powers of municipal corporations at common law, and in addition the powers thereinafter specifically granted. Power is given to the common council "to grant the right of way upon * * * any of the public streets * * * to a steam railway or horse railway company or corporation, upon such limitations and conditions as they may prescribe by ordinance" (chapter 4, page 53). The only limitations on this power are found on page 56, where certain limitations are imposed as to steam railways, and then follows a proviso that such limitations shall not apply "to any railroad running cars upon the surface of the streets and not using steam as a motive power." This shows that it was the intention of the legislature to confer as broad power as possible relative to granting rights to surface roads, i. e., street railways. See Cleveland C. Ry. Co. v. City of Cleveland, 94 Fed. 385; Walla Walla City v. Walla Walla W. Co., 172 U. S. 1; New Orleans G. Co. v. Louisiana L. Co., 115 U. S. 650; New Orleans Water-Works Co. v. Rivers, 115 U. S. 674; Louisville G. Co. v. Citizens G. Co., 115 U. S. 683; St. Tammany Water-Works v. New Orleans Water-Works, 120 U. S. 64; City Ry. Co. v. Citizens St. R. Co., 166 U. S. 557, 562; Old Colony T. Co. v. City of Atlanta, 83 Fed. 39; Cooley, Const. Lim. 335; Booth, St. Ry. Law, § 36; Morawetz, Corp. §§ 1050, 1051; Van Hostrup v. Madison City, 1 Wall. 291; City v. Newport, 84 Ky. 166, 170; City of Savannah v. Kelly, 108 U. S. 184; Los Angeles City W. Co. v. City of Los Angeles, 88 Fed. 720; Levis v. City of Newton, 75 Fed. 884, 887; Detroit C. St. Ry. Co. v. City of Detroit, 64 Fed. 628; Columbus v. City, 46 Kan. 666; Columbus v. City, 48 Kan. 99; Evansville v. Dennett, 161 U. S. 434; Christensen v. City, 45 Neb. 160; Dickson v. Kewanee, 53 Ill. App. 379; City v. Consumers, 140 Ind. 107.

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Whether the ordinance can be enforced as a police regulation ought not to be considered in this appeal. The exercise of the police power, however, must be confined to matters necessary to protect the public peace, health and morals; and the power must be exercised on grounds that are reasonable and necessary. Town v. Rose Hill, 70 Ill. 191; Rippe v. Becker, 56 Minn. 100, 112. The power must be exercised in a prohibitive and restrictive manner. Under the guise of police power the municipality has not authority to order the extension of street railway lines or the building of new lines. Moreover the ordinance is unreasonable, and does not benefit the public.

A municipal corporation has two distinct classes of powers, governmental and business. Illinois T. & S. Bank v. City of Arkansas City, 76 Fed. 271, 282; City v. Consumers, supra. It was in the exercise of its business powers that the city made a contract with the company. The language of the charter is broad enough to authorize the construction of electric street railways. Buckner v. Hart, 52 Fed. 835; Paterson v. Grundy, 51 N. J. Eq. 213; State v. Trenton, 58 N. J. L. 666; State v. Mayor, 57 N. J. L. 293; Cumberland v. United, 93 Tenn. 492; San Antonio v. Limburger, 88 Tex. 79; Simmons v. City, 8 Oh. C. Ct. 535; Dean v. Ann Arbor, 93 Mich. 330; People v. Fort Wayne, 92 Mich. 522. City of Detroit v. Detroit, cited by appellant, was reversed in 64 Fed. 628. See also Baltimore T. & G. Co. v. Mayor, etc., of City of Baltimore, 64 Fed. 153; City Ry. Co. v. Citizens St. R. Co., supra; Hinchman v. Paterson, 17 N. J. Eq. 75; Jersey City v. Jersey City, 20 N. J. Eq. 61, 69; Atchison v. Missouri, 31 Kan. 660; Brown v. Duplessis, 14 La. An. 842; State v. Corrigan, 85 Mo. 263; 2 Dillon, Mun. Corp. (4th Ed.) § 724.

MITCHELL, J.

On September 20, 1889, the city of St. Paul passed Ordinance No. 1227, commonly known as the "General Electric Ordinance," by which the defendant was authorized to construct and maintain on the streets of the city 16 different lines of street railway, all of which converged in or towards the central or business portion of the city. These, when taken together, made a complete system, run-

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ning to and from all parts of the city, and were evidently considered sufficient to accommodate the then present needs of the public. But as it was anticipated that, by reason of the future growth of the city or other causes, the needs of the public might require additional or different accommodations, it was provided by section 18 of the ordinance that

"The common council reserves and shall possess the right, at any time, and from time to time, after January 1, 1892, to order the construction and completion, by said St. Paul City Railway Company, of any new lines of railway, or the extension of any present or future lines of railway upon any and all streets in the city of St. Paul upon which sewers shall have been constructed, and all lines or extensions so ordered shall be constructed and in operation within one year after such orders are made: provided, that when such new lines or extensions are constructed all of the provisions of this ordinance shall apply thereto."

The City Railway Company accepted the provisions of this ordinance, and constructed and are operating all the lines therein provided for. Among the lines provided for was one commencing on Fifth street at Wacouta street; thence, on Fifth street to Wabasha street; thence, on Wabasha street, to University avenue; and thence, on University avenue, to the west limits of the city. This line was known as the "University Avenue Line." This is the line upon which the University avenue Interurban cars are operated, except as hereinafter stated. On May 20, 1890, the common council passed Ordinance No. 1339, amendatory of, or supplemental to, Ordinance No. 1227, authorizing the City Railway Company to construct and operate a single track on Eighth street, from Robert street to Wabasha street, to be used by the railway company as a "loop," upon which all the cars entering that portion of the city should be run, excepting under circumstances which should render running thereon impracticable. Of course to render this line available as a "loop," it was necessary to use in connection with, and as a part of it, the existing line on Robert street. The city railway accepted the provisions of this supplemental ordinance, and built the line on Eighth street and since that time, instead of operating their University avenue Interurban cars on Fifth street down to Wacouta street, run them around the Robert and Eighth street "loop."

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On May 16, 1893, the city council passed still another amendatory ordinance, No. 1686, by which the city railway company was authorized to change the East Seventh street line into an electric line, and to connect it with the West Seventh street line, and further providing that the cars operated on the Maria avenue line provided for in Ordinance No. 1227, should be thereafter run on East Seventh street as far west as Robert street. The railway company accepted the provisions of this ordinance, and made the authorized changes, so that the Seventh street cars are now operated as a continuous line from Fort Snelling to Duluth avenue in the eastern part of the city, and the Maria avenue cars are run down Seventh street to Robert street. By this same ordinance the defendant company was required to construct and operate a double-track line of railway beginning at the intersection of Rice street and Como avenue, thence along Como avenue to its intersection with Front street, thence along Front street to its intersection with Chatsworth street, thence along Chatsworth street to its intersection with Van Slyke avenue, thence along Van Slyke avenue to Como Park. This is what is known as the Como Park line. The ordinance provided that the cars operated over this line should be run "to and from the central portion of the city." The Como avenue line, ever since its construction, has been operated over the route above specified to Wabasha street, and thence on Wabasha street to Fifth street, thence down Fifth street to Robert street, and thence on Robert and Eighth streets around the Eighth street "loop" back to Wabasha street.

On May 8, 1897, the city council passed still another ordinance, No. 1925, by which the defendant was ordered and directed within one year to change and extend the operation of its University avenue, or Interurban, and its Como avenue lines of cars by running them easterly on Fifth street to Broadway street (a distance of five blocks east of Robert street), thence north on Broadway to Seventh street (a distance of three blocks), thence west on Seventh street to Wabasha. The effect of this was to extend the service of these two lines five blocks further east, and to make the "loop" on Broadway and Seventh streets instead of Robert and Eighth streets as before. These portions of Fifth, Broadway and Seventh streets

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were already provided with car service by other lines, and the proposed change and extension of the service of the Interurban and Como lines would not require the construction of any new track. It is conceded that sewers had been already constructed upon all of these streets. The defendant having refused to comply with the provisions of this ordinance, this proceeding was brought at the relation of the city to compel it to do so. The defendant claimed that the ordinance was void, because it was required to do what it was not required to do under the general electric ordinance No. 1227, and not within the power reserved to the city council under section 18 of that ordinance. The trial court sustained this contention and held that Ordinance No. 1925 was void.

The trial seems to have been conducted upon the theory that Ordinance No. 1227 was to be construed precisely as if it was a contract between two private individuals. It is but fair to say that counsel for the city was largely responsible for this. This, however, is altogether a too narrow, and even erroneous, view to take of the case. We shall assume, without discussion, that Ordinance No. 1227 contains a valid contract between the city and the street railway company, the obligation of which the former cannot impair.

But this proposition is subject to the following qualification. Among the governmental powers vested by the city charter in its common council is "the care, supervision, and control of all public highways, bridges, streets," etc. Without attempting to define the extent or limits of the power thus granted, it unquestionably gives the common council authority to enact such police regulations regarding the use of the streets as are necessary for the safe and convenient enjoyment of them by the public for the purposes for which they are designed. It is fundamental that a municipality cannot, at least without express legislative authority, deprive itself by contract of any governmental powers conferred upon it for public purposes. Flynn v. Little Falls E. & W. Co., 74 Minn. 180, 77 N. W. 38. Hence any authority to use the streets granted to the defendant must be construed as being subject to the police power of the city over the streets, whatever may be the language of the grant. For example, if by reason of increased traffic on the streets prescribed for the construction and operation of the "loop," or for

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any other reason, the use of those streets for that purpose became inconsistent with the convenient use of the streets by the public, or a menace to the safety of the public, in our opinion it would be unquestionably within the police power of the city to enact an ordinance requiring the loop to be changed to some other reasonable location. In short, while a municipality cannot impair the obligation of its contract under the guise of exercising its police power, yet it cannot surrender or barter away its police powers under the guise of making a contract.

Whether Ordinance No. 1925 was enacted in the exercise of the "police power," strictly so called, or to secure more and better service for the traveling public by the extension of the Interurban and Como avenue lines, and, if the former, whether it was or was not a reasonable exercise of the police power, does not appear. Of course, if the ordinance was enacted in the exercise of the police power, it will be presumed to be reasonable and valid until the contrary is made to appear. Both of the counsel seem to have tried the case upon the assumption that the object of the ordinance was to extend the service on the Interurban and Como avenue lines, under the authority reserved to the city council by section 18 of Ordinance No. 1227. The court also decided the case upon this theory. But, even on this assumption, in our judgment, the facts did not justify the conclusion at which the court arrived.

The position taken by the court below, and by the counsel for the defendant in this court, was that the power reserved to the common council in section 18 was only the right to compel the construction of new lines, or the extension of present or future lines, on streets or portions of streets not already provided with street-car service, and not the right to compel the extension of the service of the cars of one line over or along streets or portions of streets upon which other lines are already operated. In support of this view, especial stress is laid upon the particular words and expressions used in the section, such as "the construction and completion," and "shall be constructed and in operation"; also upon the fact that the ordinance provides for a complete system of transfers from one line to another, without additional cost, and requires the cars on all lines to be

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operated with sufficient frequency to accommodate the traveling public.

With all due deference to the learned court and counsel, we think they attach altogether too much weight to these facts The right of transfer from one line to another, without extra charge, is, as every one knows, not the equivalent of a continuous ride on the same car to the place of destination. Again, while it is probably true that what was more particularly in mind in framing this section was cases where public convenience would require car service on streets or parts of streets not already provided with any car service at all, and hence where the extension of the service would involve the construction of a track, yet there is nothing in the section which limits its operation to such cases. A railway track is only a means to an end. What is needed is not merely the track, but the service. That is what the section was designed to secure. There is nothing in it limiting the right to require an extension to the outer end of an existing line. Public needs may require it at either end. The plan or scheme of street-railway systems is generally to furnish the means of communication between the outlying portions of a city and its business or central portion. This was evidently the scheme of the system of lines provided for in Ordinance No. 1227. As the business portion of a city increases in area, or its business center shifts, as is often the case, there arises a necessity for extending the street-car lines inwardly, so as to reach or penetrate it. If there had been no existing line operated on Fifth street between Robert street and Broadway street, or upon Broadway between Fifth and Seventh streets, or on Seventh from Broadway to Wabasha street, we do not see how it could be successfully claimed that the extensions required by the common council were not within the provisions of section 18. Why should it be held not within them merely because there is already a railway track on those streets, over which the extended service is to be furnished, and hence the defendant not required to incur the expense of building one? It seems to us that it is a case for the application of the axiom that the whole includes all its parts.

But it is suggested that, if this extension can be required, there is no limit to the power of the common council in the matter of ex-

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tending the service of one line over tracks used by any other line; that, on the same ground, it would have authority to require the Interurban and Como avenue cars to be run over the Seventh street line, out to the eastern limits of the city, or over to West St. Paul. This by no means follows. There is reason in all things. As already suggested, Ordinance No. 1227 contemplates a system of lines converging towards, or terminating in, the central or business portion of the city, so as to furnish a means of communication between it and the outlying portions of the city. How far and to what distance any of these lines shall be extended into this business or central portion of the city is, and must of necessity be, a matter largely addressed to the judgment and discretion of the common council. But if it was attempted to require the extension of the service of any line over a track on which another line was operated, entirely through the central portion of the city, out into a suburban district on the opposite side of the city, we apprehend that, unless there were some very exceptional circumstances creating a necessity for it, a court would very unhesitatingly hold that the common council had no authority, under either section 18 or the general police power, to require this to be done. There is nothing in the record tending to prove that this is any such case.

Our conclusion is that the order appealed from should be reversed, and the case remanded for a new trial. It is so ordered

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JULIUS WITTENBERG v. L. K. ONSGARD.

December 15, 1899.

Nos. 11,725—(30).

Expert—Cross-Examination.

A medical expert, having in his evidence in chief diagnosed the injury to the plaintiff as a dislocation of the cervical vertebræ, complicated with a fracture, and having then testified, without qualification or limitation, that the accepted treatment of a dislocation of cervical vertebræ, as laid down by the medical authorities, was a reduction of the dislocation, was

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asked on cross-examination whether a certain work (admitted by him to be a standard authority) did not lay it down that, where the dislocation was complicated with a fracture, no physician would be justified in attempting to reduce the dislocation. *Held*, that this was proper cross-examination, and that it was error to exclude the question.

Hypothetical Question.

All hypothetical questions put to an expert witness must be based upon facts admitted or established, or which, if controverted, might be legitimately found by the jury from the evidence. They should also embody all the facts relating to the subject upon which the opinion of the witness is asked. A certain hypothetical question *held* to have been improperly allowed, because not including all the facts bearing upon the subject upon which the opinion of the witness was asked, and also because it was based in part upon a fact not admitted or established, and which there was no evidence tending to prove.

Waiver of Jury Trial.

The court may disregard a waiver of a jury trial by the parties, and require the issues to be submitted to a jury. The matter is addressed to his sound discretion. The waiver of a jury in this case construed as applying only to the term of court at which it was made.

Application to Photograph Plaintiff.

Held, also, that an application of the defendant to the court to require the plaintiff to submit his neck to be photographed by the use of the Roentgen or X-rays, in order to ascertain the nature of his injuries, was properly refused, because the application was not seasonably made, and also because it did not sufficiently appear that the person by whom it was proposed that the photograph was to be taken had the requisite skill and experience to properly apply the rays.

Roentgen Rays.

Whether science is yet sufficiently advanced to justify the courts in taking judicial notice, as an established fact, that exposure to X-rays is not injurious to the subject, quære.

Action in the district court for Houston county to recover $10,000 damages for alleged malpractice as a physician. The case was tried before Whytock, J., and a jury, which rendered a verdict in favor of plaintiff for $1,500; and from an order denying a motion for a new trial, Kingsley, J., defendant appealed. Reversed.

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Duxbury & Duxbury, for appellant.

The stipulation waiving trial by jury and the order thereon had the force of a contract, and could be set aside only for the same reasons that would avoid a contract. 1 Thompson, Tr. § 361; Bingham v. Board of Supervisors of Winona Co., 6 Minn. 82 (136), 8 Minn. 390 (441); Rogers v. Greenwood, 14 Minn. 256 (333); In re Heath, 83 Iowa, 215; Pike v. Emerson, 5 N. H. 393; Bonney v. Morrill, 57 Me. 368, 372; McLeran v. McNamara, 55 Cal. 508; Shaw v. Henderson, 7 Minn. 386 (480); Eidam v. Finnegan, 48 Minn. 53.

The hypothetical question assumed a fact that was contrary to the pleadings as well as the evidence. Vosburg v. Putney, 80 Wis. 523; Prentis v. Bates, 88 Mich. 567. Hypothetical questions must be based on facts admitted or established, or which if controverted might legitimately be found by the jury. Matter of Mason, 60 Hun, 46. The court should have exercised its discretion on the question of ordering the examination. Schroeder v. Chicago, 47 Iowa, 375, 378; Hall v. Incorporated, 99 Iowa, 698; Barker v. Town, 67 Iowa, 146; White v. Milwaukee, 61 Wis. 536, 540; Hatfield v. St. Paul & D. R. Co., 33 Minn. 130; Atchison v. Thul, 29 Kan. 466.

E. H. Smalley, for respondent.

The court had power to vacate the stipulation. Gerdtzen v. Cockrell, 52 Minn. 501; G. S. 1894, § 5267. It had a right to submit the case to the jury on its own motion under section 5361. Hulett v. Carey, 66 Minn. 327, 332; Cobb v. Cole, 44 Minn. 278 Such stipulation during the course of the trial is not regarded as a contract. Cochran v. Stewart, 66 Minn. 152. Had defendant incurred expense, or assumed liability, or acquired intermediate rights, it would have been fair that he be placed in statu quo. Wells v. Penfield, 70 Minn. 66. The exclusion of the evidence on cross-examination of plaintiff's medical expert was proper. Kreuziger v. Chicago, 73 Wis. 158; People v. Hall, 48 Mich. 482; Stilling v. Town, 54 Wis. 528; Knoll v. State, 55 Wis. 249; 2 Rice, Ev. 1255.

Denial of the application for an examination was proper. Union Pac. Ry. Co. v. Botsford, 141 U. S. 250; Illinois C. R. Co. v. Griffin, 25 C. C. A. 417; Peoria v. Rice, 144 Ill. 227, 229; Joliet v. Call, 143 Ill. 177; McQuigan v. Delaware, 129 N. Y. 50; O'Brien v. City, 99

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Wis. 421; Shepard v. Missouri, 85 Mo. 629; Sioux City v. Finlayson, 16 Neb. 578. Injury from burning by such examination was possible. Boelter v. Ross, 103 Wis. 324, 79 N. W. 243.

MITCHELL, J.

This is an action against the defendant for malpractice as a physician while professionally treating the plaintiff for certain injuries which he had received by being thrown from a moving hand car. The allegations of the complaint as to the injuries which plaintiff had received were

"That by reason of said cause plaintiff was seriously injured in the neck, back, side, shoulders, and spine, and in particular the vertebra of the spinal column in the vicinity of the neck was dislocated by said injury."

The malpractice charged against the defendant was that he

"So negligently and unskilfully conducted himself, in attempting to heal said injury and to set said dislocation, that the said dislocation of said vertebra in said spinal column became permanent, and the plaintiff rendered helpless and permanently maimed and crippled for life; that said defendant wholly failed and neglected, while so in charge of plaintiff as his patient, to ascertain by careful examination the said dislocation, and cure the said injury in the said spinal column; that the said vertebra in the spinal column ossified, and became and it is impossible, without great danger of death ensuing to plaintiff thereby, to cure or set said dislocation of the said vertebra."

In his answer the defendant denied

"That the vertebra of the spinal column in the vicinity of the neck, or in any other place, was dislocated," and admitted "that he failed to set said dislocation because no such dislocation existed."

Upon the trial the principal contentions of the plaintiff, and to which his evidence was mainly directed, were (1) that he had sustained a dislocation of the cervical vertebræ; (2) that defendant ought, in the exercise of ordinary professional skill, to have discovered that fact; and (3) that the proper treatment in such a case would have been to reduce or set the dislocation. On the other hand, the contentions of the defendant, to which his evidence was principally directed, were (1) that the plaintiff had not sustained

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any dislocation of the cervical vertebræ, but merely a sprain, accompanied with contusion of the spine; and (2) that, even if plaintiff had sustained a dislocation of the cervical vertebræ, what is termed the "expectant" method of treatment is the proper one, and that, because of the great danger of injuring the spinal cord, a reduction of a dislocation should not be attempted, except as a last resort, in cases where it is apparent that death will otherwise ensue.

A medical expert called as a witness by the plaintiff gave in his examination in chief a diagnosis of the injury which in his opinion the plaintiff had sustained, viz. a dislocation of the cervical vertebræ, complicated with a fracture. He was then asked what was the accepted method, as laid down by the medical authorities, of treating a dislocation of the cervical vertebræ, and answered that it consisted of reducing the dislocation, followed by a course of treatment not necessary to be here referred to. On cross-examination the witness was referred to a medical work, admitted by him to be a standard authority, and asked if it was not laid down by that authority that, when the dislocation is complicated with a fracture, no doctor would be justified in attempting to press and reduce the dislocation. Upon the objection of the plaintiff, the question was excluded. This was manifest error, in view of the witness' previous diagnosis of plaintiff's injury, followed by his testimony, without limitation or qualification, that reduction was the accepted method of treating a dislocation of the cervical vertebræ, as laid down by the medical authorities. From the colloquy on the trial between court and counsel, it is apparent that the former misapprehended the bearing and purpose of the question.

The same witness was asked, and, over defendant's objection, permitted to answer, the following hypothetical question:

"Assuming that the plaintiff received a dislocation of a cervical vertebra September 30, 1894; that the defendant commenced to treat him the following day, and, with the evidence of such dislocation brought to his attention, he continued to treat the plaintiff for over two months, and no attempt made to reduce the dislocation, or even a suggestion by the doctor that there was a dislocation, he having knowledge of such injury,—would you consider that proper medical treatment?"

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His answer was, "No." This was also error. All hypothetical questions must be based upon facts admitted or established, or which, if controverted, might legitimately be found by the jury from the evidence. Such a question should embody substantially all the facts relating to the subject upon which the opinion of the witness is asked, since the opinion of the witness is worthless, and may be misleading, if given on a state of facts that does not exist, or upon an incomplete statement of the facts bearing upon the subject upon which the opinion of the witness is asked. The evidence in this case tended to show that dislocation of cervical vertebræ might be of different degrees, or at least accompanied or unaccompanied by certain complications, such as a fracture, and that the dislocation sustained by plaintiff was complicated with a fracture, and that the treatment of a dislocation might depend on the presence or absence of certain complications. The question propounded was based upon an incomplete hypothetical statement of facts. It was also based in part upon a hypothetical fact which was neither admitted nor sustained by any evidence in the case, to wit, that the defendant knew that the plaintiff had sustained a dislocation of the cervical vertebræ. On the contrary, the evidence is conclusive that the defendant did not know that plaintiff had received any such injury. And plaintiff, both in his pleading and upon the trial, proceeded upon the theory that defendant's failure to discover the dislocation was due to either his lack of skill, or his failure to make a proper examination.

On account of these errors there must be a new trial, but, in view of such trial, there are two other questions which should be considered:

The case was one in which the parties were entitled to a jury trial. On February 23, 1897, when an adjourned or special term of the district court for Houston county was in session, at which it seems to have been expected that this case would be reached for trial, the attorneys for the respective parties signed and filed a stipulation waiving a jury, and consenting that the case might be tried by the court. The term of court then in session was adjourned until April. The plaintiff applied to the court to set aside this stipulation, and set the case for trial to a jury at the April special term,

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to be held on the 27th of that month. The ground on which this was asked was, in substance, that the stipulation waiving a jury was entered into solely with reference to the then existing exigencies, arising out of the fact that it was then supposed that, if the case was to be tried to a jury, it would be necessary for the plaintiff to keep a large number of witnesses in attendance at large expense, and also because, if a jury was not waived, he might be compelled to move for a continuance on account of the nonarrival of a certain deposition, and that these exigencies had all been removed by the court's ordering the jury to return at the April special or adjourned term. The April term closed without the case being reached, and it went over to the regular term the following October. The judge never made any formal disposition of plaintiff's motion, but on April 15 he wrote to the attorneys that he thought the case was one which ought to be tried by a jury, and not by the court, and that they had better be prepared accordingly. When the cause was reached for trial at the October term, the court, at the request of the plaintiff, and against the objection of the defendant, ordered the case to be tried to a jury. This is assigned as error.

The authorities are generally, if not uniformly, to the effect that the court may disregard the waiver of a jury by the parties, and, on his own motion, require the issues of fact to be submitted to a jury; that this is a matter addressed to his sound discretion. Burke v. Breazeale, 1 Rob. (La.) 73; McCarthy v. Missouri, 15 Mo. App. 385; Bullock v. Consumers (Cal.) 31 Pac. 367. The authorities seem to be also to the effect that a waiver of jury trial, so long as not yet acted on, may be withdrawn, with the consent of the court, and a trial by jury demanded, at least where the withdrawal will not prejudice the opposite party. All that is decided in State v. Bannock, 53 Minn. 419, 55 N. W. 558, is that the waiver cannot be recalled at will, or as a matter of right. The law zealously guards the right of trial by jury. Waivers of the right are always strictly construed, and are not to be lightly inferred, or extended by implication. It is reasonably apparent that the waiver of a jury in this case was made only with reference to the exigencies of the then current term of court, and should not be extended so as to apply

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to a subsequent term. The action of the court in ordering the case to be tried to a jury may be sustained on any of these grounds.

During the progress of the trial the defendant introduced the testimony of a medical expert, tending to prove that the nature of the injury to plaintiff's neck could be ascertained by the application of the Roentgen (commonly called "X") rays, that the witness had some experience in the use of these rays in surgery, and that no evil effects would result from their use, except that, if there was a very long exposure of the parts to the rays, there might be a burning of the skin, but that there would be no necessity for any such prolonged exposure for the purpose of taking a photograph of plaintiff's neck. On this showing, defendant's counsel then requested the court to give him "the privilege of taking an X-ray photograph of plaintiff's neck." Although peculiarly worded, this must be construed as asking the court to require the plaintiff to submit his neck to the X-rays for the purpose of taking a photograph of it. The court's refusal to so order is assigned as error.

The discovery of the X-rays is comparatively recent. Its utility and the reliability of its results are already so well established as scientific facts that courts ought to take judicial notice of them. And, if the fact that the exposure of the person to these rays is harmless becomes as well established in science as is the accuracy of photographs taken by them, there is as much reason why, in a proper case, under proper safeguards, and at the reasonable request of the defendant, the plaintiff should be required, in a case like the present, to submit his neck to those rays for the purpose of photographing it, as there is for requiring a party to submit his person to a physical examination, as in Wanek v. City of Winona, supra, page 98. Whether science is as yet sufficiently advanced on the subject so to hold may admit of doubt, and a person cannot be required to submit his person to any process which is liable to injure him. It is impracticable to stop the trial in order to ascertain by evidence whether the exposure of a part of the human body to these rays is liable to result in injury. Moreover, if any such practice should obtain, there would be no uniform rule on the subject, as each case would depend on the evidence introduced, and the conclusion which the particular judge would draw from

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it. Hence a party ought not to be required to submit his person to the X-rays until it is so well established as a fact in science that the process is harmless, that the courts will take judicial notice of it. It may admit of doubt whether that time has yet arrived.

But, without passing upon that question, we are of the opinion that defendant's request was properly refused for two reasons: (1) That the request was not seasonably made; and (2) that it did not sufficiently appear that the person by whom the defendant desired the photograph to be taken had the necessary skill or experience properly and safely to apply the rays without injury to the plaintiff.

Order reversed, and a new trial granted.

MILLE LACS LUMBER COMPANY v. CHARLES KEITH and Others.

December 15, 1899.

Nos. 11,818—(136).

Principal and Agent—Adverse Title Acquired by Agent.

While K. was in plaintiff's employ, in the year 1884, he examined the titles to lands in a certain county, which plaintiff corporation then claimed to own. He then wrote a letter to such corporation, in which he reported its title perfect to a certain tract. He had no abstract of title when making his examination, and relied upon the grantors' and grantees' reception books, kept by the register of deeds as by law required. The conveyances on record, noted and entered in these books, showed plaintiff's title to the land to be perfect, but, as a matter of fact, there had been recorded, but not noted or entered in either of these reception books, a deed of conveyance to one D., which rendered plaintiff's title or claim of title of no value. K. did not discover this, and no claim is made that he was negligent in not discovering the record of such a deed. Nor is it contended that he did not act in perfect good faith when searching the records and when writing the letter. Eleven years after leaving plaintiff's employ, K., in good faith, bought the land, with several other tracts, from one S., who was supposed to be the grantee of D., and obtained a conveyance from him. In an action brought by plaintiff against K., and also against other persons to whom he had conveyed, it is *held* that K. cannot be adjudged to have been a trustee of the land for the plaintiff, on the ground of the former relations existing between them.

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On Reargument.

February 2, 1900.

Reversal upon Reargument.

A reargument having been ordered in this case, it is *held* that the conclusion heretofore rendered was erroneous, and that the order appealed from must be reversed.

Same.

All that was said in the former opinion as to the rules of law applicable to the supposed state of facts is withdrawn, leaving all questions which may arise if such facts are established at another trial to be determined de novo.

Action in the district court for Mille Lacs county to recover judgment that the title to certain land be decreed to be by defendants held in trust for plaintiff, and that defendants be required to convey to plaintiff, and in default that plaintiff recover the value of the premises. The case was tried before Searle, J., who granted defendants' motion to dismiss the action; and from an order denying a motion for a new trial, plaintiff appealed. Reversed on reargument.

Stevens, O'Brien, Cole & Albrecht, for appellant.

One who occupies a fiduciary relation in respect to property is disabled from purchasing it, and is regarded as trustee if he do purchase. Fraud need not be shown, and no excuse from the trustee will be heard. King v. Remington, 36 Minn. 15. The rule is broad enough to include anyone who has access to the papers of his principal. Keech v. Sandford, 1 White & T., Lead. Cas. pt. 1, 48–73. An attorney cannot use information received from his client. Weeks, Attys. § 279. See Id. §§ 174, 277. If counsel be retained to defend a particular title to land, he can never thereafter, unless by his client's consent, buy the opposing title without holding it in trust for those then having the title. Henry v. Raiman, 25 Pa. St. 354; Baker v. Humphrey, 101 U. S. 494; Davis v. Kline, 96 Mo. 401. An attorney may in no case, without his client's consent, buy and hold, otherwise than in trust, any adverse title or interest touching the thing to which his employment relates. Baker v. Humphrey,

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supra; Davis v. Kline, supra. The principle applies in cases other than those of attorney and client. Baker v. Humphrey, supra.

Warner, Richardson & Lawrence, for respondent Keith.
S. & O. Kipp, pro se.

COLLINS, J.

All during the year 1884, defendant Keith was in plaintiff's employ. From a letter written by him in March of that year addressed to Hon. Greenleaf Clark, but which will be treated by us as if written directly to plaintiff company, it appears that Keith, although not then admitted to the bar, examined and reported upon titles to land in Mille Lacs county which plaintiff claimed to own. The letter was written with reference to these titles, and it was therein stated that plaintiff's title to the premises now in controversy was perfect. As a matter of fact, the title to this particular tract was not in the plaintiff; but it is not claimed that Keith acted in bad faith, or that he was negligent in failing to discover the defect in plaintiff's title. He was not furnished with an abstract, and in his research relied upon the grantors' and grantees' reception books, kept in the office of the register of deeds as required by law, together with an examination of the conveyances therein noted and entered. From these books it appeared that Rollins, to whom the government patent had been issued, conveyed the land to one Hayden in 1881, and that plaintiff had properly succeeded to Hayden's rights. But when Rollins conveyed to Hayden there was on record a conveyance of the land, executed and delivered in 1881 by Rollins, the patentee, to one Davis, so that plaintiff's title was wholly defective. This conveyance was not noted or entered in either of the reception books, and was not discovered by Keith, nor did he learn of it, until 1896, some 12 years after he wrote the letter, and about 11 years after he had left plaintiff's service, and at a time when he had entirely forgotten that he, in 1884, had made an examination of the title thereto for plaintiff.

In the belief that Davis had sold and conveyed the land to one Sanborn, Keith purchased this tract from the latter, with several other pieces, obtained a deed, placed it on record, and then sold and conveyed the premises to defendants S. & O. Kipp. This

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action was brought to obtain a decree declaring the land to be held in trust for plaintiff company, and also directing its conveyance to plaintiff by the defendants, upon the ground that the purchase by Keith inured to the benefit of plaintiff, and that when obtaining the conveyance from the former the Kipps were advised of the relations which existed between him and plaintiff, and had full knowledge of its rights and equities in the premises. A money judgment was also demanded against defendants for the value of the land, in case the title to the same could not be conveyed to plaintiff. In his answer defendant Keith asserted that he acquired complete title to the land through the Sanborn deed, and that he conveyed perfect title to the Kipps. In their answer the latter alleged that they were good-faith purchasers, without notice or knowledge of plaintiff's claims, and also averred that they were the owners in fee of the premises.

At the trial both parties seem to have been surprised on discovering that the deed of conveyance through which it was supposed Sanborn acquired title was not executed by Davis, to whom Rollins had deeded in 1859, but, according to the record, was executed by one "Davie," and no effort was made to show that, in fact, it was executed by the Davis named as grantee in the Rollins deed. At the conclusion of the testimony, the case was dismissed as to all of the defendants. The appeal is from an order denying plaintiff's motion for a new trial.

Counsel for the latter invoke in this case, and seek to have applied, the doctrine, which they claim is well settled by the authorities, that an agent shall not be permitted to take advantage of, or to profit by means of, the discovery of a defect in the title of his principal to real property, and that if he does misuse information which he has obtained in respect to such title, and acquires the same himself, he must be held as a trustee of such title for his principal. In fact, counsel go further, and insist that this is a case for the application and enforcement of the rule which has sometimes been announced as controlling between attorney and client, namely, that, without the latter's consent, the former can in no case, and at no time, buy and hold, otherwise than in trust, any adverse title or in-

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terest touching the client's real estate to which the attorney's present or past employment was related.

It is undoubtedly true that any person to whom has been intrusted the examination of the titles of his employer's real estate occupies a relation towards such employer of a confidential and fiduciary nature, not specially different in character from that occupied by an attorney at law to whom has been confided the examination of a client's title to real property. Such a person is an agent for that special purpose, and must not violate or betray the trust. This principle is applied to trust relationships, seemingly, of a less inviolable character than that which subsists between attorney and client, as will be found upon an examination of the authorities. But the whole doctrine, whenever applied as to an agent or an attorney, rests upon the proposition that the interests of the principal and of the client must be protected and made secure, and that in the particular instance there has been a fraudulent betrayal of the trust and confidence which such principal or client has placed in his agent or attorney to whom he has intrusted the examination of his real-estate titles. Now, in this case, it conclusively appears that Keith obtained no information while in plaintiff's employ on which can be based a claim that when subsequently acquiring the Davis title, as he supposed, he was guilty of fraud upon his former employer. He learned nothing when investigating the title to the tract in dispute on which can be predicated an assertion that he knowingly or ignorantly took advantage of his principal. He betrayed no trust or confidence, when, after 12 years, he procured the Sanborn deed. As before stated, there is no claim that, when examining the title, Keith was negligent; for he could not have discovered the deed from Rollins to Davis without reading the records from the earliest entries up to and including that particular instrument.

Without attempting to define precisely how far we should go in enforcing the well-settled rules which control all transactions wherein an agent or an attorney has used his position and knowledge to further his own interests, we are safe in saying that there are no adjudicated cases which go to the extent required here in order to hold that whatever rights or interests Keith obtained

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through the Sanborn deed inured to the plaintiff, and must be awarded to it, because of the relations which had previously existed between them. The principles upon which the doctrine is founded fall far short of supporting the claim of plaintiff's counsel. There might be circumstances, in a case of this character, whereby one who had been an agent would be estopped from asserting a title in opposition to that held by his principal; but this is not a case of estoppel, for a number of reasons. Holding, as we do, that Keith cannot, on the facts, be adjudged to have been a trustee of the land for plaintiff, it follows that no relief could be had as against any of the defendants, and that the case was properly dismissed as to all.

Order affirmed.

On February 2, 1900, the court rendered the following decision:

PER CURIAM.

A misapprehension as to what plaintiff's counsel conceded the facts to be upon the argument of this cause led to certain misstatements in the opinion heretofore filed, and, upon this being made to appear, a petition for reargument was granted. On such reargument, we are satisfied that the order appealed from must be reversed. This conclusion leads us to withdraw all that was said in that opinion in respect to the law applicable to the supposed facts. This leaves all questions which may arise if such facts should be established at another trial to be determined de novo.

We have heretofore stated generally the allegations of the complaint In addition to charging defendants Keith and S. & O. Kipp with bad faith,—the former when purchasing from Sanborn, and the latter when receiving a conveyance from Keith,—the complaint set forth that the Kipps by virtue of the conveyance claimed to have some right, title, and interest in and to the land adverse to plaintiff's title. By the allegations of their answer the defendants Kipp set up an adverse claim, alleged that the premises were vacant and unoccupied, that they were the owners and entitled to possession, and demanded that the title be quieted and adjudged to be in them in fee simple. The answer of defendant Keith, while drawn somewhat peculiarly, must for present purposes be construed as denying plaintiff's title to the land, or that it has any rights or interests

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therein as against either of the defendants, and as alleging title in Keith up to the time he conveyed to S. & O. Kipp, and that thereupon they became the owners. And, notwithstanding that the testimony is meager as to Mr. Clark's connection with the plaintiff corporation when Keith wrote the letter, we remain of the opinion that it must be treated as if written directly to such corporation.

Now, when the case was dismissed on defendants' motion, it appeared from the evidence that plaintiff's title was complete and perfect. Rollins held the government patent of date February 4, 1854, and duly recorded. He conveyed to Hayden by deed bearing date December 7, 1881, and recorded upon the same day. Hayden deeded to Tod and Hammons on January 6, 1882, which deed was recorded October 23, 1882. The latter deeded to plaintiff December 1, 1882, and this deed was put on record November 27, 1883. Another conveyance relating to this land, which had been received in evidence when the case was dismissed, was a deed from Rollins to Ruth A. Davis of date November 2, 1859,—an earlier date than that found in the deed from Rollins to Hayden,—but it was not shown when this deed was recorded. According to the return to this court, this Davis deed was recorded January 21, 186–, an impossible date. It may have been recorded prior to the Hayden deed, December 7, 1881, or it may have been recorded later. Undoubtedly the fact can be shown when the case is again tried. Another conveyance relating to the land was a deed from Ruth A. Davie and husband to Sanborn, of date January 25, 1859, recorded September 28, 1859. It may be that Ruth A. Davis and Ruth A. Davie were one and the same, but no attempt was made to show it. In 1896 Sanborn deeded to defendant Keith.

It will be seen that, when the case was dismissed, plaintiff appeared to be the owner in fee of the land, while defendants, apparently without title, were asserting that Keith had been the owner, and that S. & O. Kipp were then the owners. A dismissal of the case left defendants exactly where they were when the issues were framed,—asserting title, but on the face of the evidence without any title whatever. Although the Kipps had insisted by their answer that plaintiff was not the owner and had no title or interest in or to the land, that it was vacant and unoccupied, and that they were

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the owners and entitled to possession, and had demanded that plaintiff's adverse claim be determined as unfounded, the action was dismissed when plaintiff had at least made a prima facie case against the Kipps, independent of its right to relief as against Keith. The motion to dismiss should have been denied, and it is immaterial whether, as to Keith, the denial should have been placed on the ground that, as the proofs stood, his purchase from Sanborn inured to the benefit of his former principal, or, as against the Kipps, on the ground that plaintiff had established its own title in fee to land which they claimed adversely, or upon both grounds.

Order reversed.

TWOHY MERCANTILE COMPANY v. O. C. MELBYE.

78 357
78 361
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s88 396

December 15, 1899.

Nos. 11,835—(144).

Tracing Trust Fund—Garnishment.

The doctrine that, where property or money has been wrongfully converted, equity will follow it through its transmutations, and impress its product or avails with a trust in favor of the original owner, so long as they can be traced and identified, has its basis in the right of property, and not in any theory of preferring the owner of the property over creditors of the tort feasor, because of the wrongful conversion. It proceeds upon the theory that the product of the converted property has imparted to it the nature of the original property, and belongs to the same person.

Evidence.

Evidence considered, and *held* not to sufficiently trace and identify the fund, sought to be impressed with a trust, as the avails of the fund wrongfully converted.

Action in the district court for Clay county against O. C. Melbye, defendant, and the First National Bank of St. Paul, garnishee. Thore Alme intervened as claimant of funds disclosed by the garnishee to the amount of $401.55. The issues between the intervenor and plaintiff were tried before Baxter, J., who found that the intervenor was entitled to judgment against the garnishee for $401.55,

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and against plaintiff for interest on that sum from January 1, 1898. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

Tillotson & Campbell and *Oscar Hallam*, for appellant.

C. A. Nye, for respondent.

MITCHELL, J.

In this action the plaintiff on December 31, 1897, garnished the First National Bank of St. Paul, in which, as appeared from the subsequent disclosure, the defendant Melbye had on deposit at that time the sum of $472.61. On August 23, 1898, Alme appeared and filed his claim in intervention, by which he claimed to be the owner of the money on deposit with the garnishee bank, to the amount of $401.55. The facts upon which this claim was based are as follows:

Alme, being indebted to one Odegaard in the sum of $401.55 on a real-estate mortgage, which was due, and which he was desirous to pay, on December 27, 1897, gave to the defendant Melbye that amount in currency, with which to pay the mortgage. Counsel disagree as to whether Alme paid the money to Melbye as Odegaard's agent, or as his own agent to remit the money to Odegaard. In our opinion, this is immaterial. The evidence is conclusive that Melbye was not Odegaard's agent, and had no authority to collect the mortgage. Hence, whichever view is taken of the disputed fact, the money remained the property of Alme, and Melbye held it in trust for him, under either an express or an implied trust. Melbye used Alme's money to pay "grain checks." By whom these checks were issued does not appear. In the absence of evidence on the subject, probably the presumption would be that they were issued by Melbye himself, and were his own obligations. Two or three days afterwards Melbye remitted to the First National Bank of St. Paul a draft or check for $385 on the Thorpe Elevator Company (afterwards honored), and a check for $200 on the Scandinavian American Bank of St. Paul, with request that they be deposited to his credit, which was done. There is no evidence that either the draft or check was in any way the proceeds or avails of Alme's money, which Melbye had used; nor is there any evidence as to the source from which they came. This deposit, to the amount of $472.61, was

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standing to Melbye's credit when the bank was garnished. On December 30 Melbye remitted his check on the First National Bank of St. Paul for $401.55 to a bank in Minneapolis, in which Odegaard kept his account, with the request that it be placed to his (Odegaard's) credit; but, as Melbye's account in the bank in St. Paul had been garnished by the plaintiff before this check was presented for payment, it was dishonored, and subsequently returned by the Minneapolis bank to Melbye.

In his testimony in chief, Melbye testified that he sent Alme's money to the First National Bank of St. Paul; but on his cross-examination he admitted the facts to be as above stated, but said that the cleck on the Thorpe Elevator Company was issued in place of the money that Alme had paid him. There is no explanation as to what he meant by this. But, in view of the other evidence, it can mean nothing more than that, having used Alme's money in his own business, he remitted to the St. Paul bank for deposit a draft or check belonging to himself, and not shown to be the proceeds of Alme's money, and then checked against the deposit for the purpose of paying Odegaard the amount which Alme had given him to pay Odegaard's mortgage. Upon this state of facts the trial court ordered judgment in favor of the intervenor against the garnishee bank for $401.55, and against the plaintiff interest on that amount from the date of the garnishment.

It is not claimed, and could not be successfully, that the issuing of the check to the Minneapolis bank in favor of Odegaard operated as an assignment pro tanto of the fund on deposit in the St. Paul bank to Melbye's credit. The intervenor makes his claim on the theory that the money paid by him to Melbye constituted a trust fund, which, in a substituted form, he has traced into the deposit in the First National Bank of St. Paul, standing to Melbye's credit. The evidence is ample to justify a holding that the $401.55 was a trust fund in the hands of Melbye, but it utterly fails to trace the fund, in any form, into the deposit in the hands of the garnishee.

Where the property of one has been wrongfully appropriated by another, the courts hold that so long as the property can be identified, either in its original or in a substituted form, it belongs to the original owner, if he elects to claim it, and, if it passes into the

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hands of an innocent purchaser, the title of the defrauded owner, at his option, at once attaches to the avails, so long as their identity is preserved. This doctrine has its basis in the right of property, and not in any theory of a preference to the owner of the property over creditors of the tort feasor because of the unlawful conversion. It proceeds upon the theory that the product or avails of the property have imparted to them the nature of the original property, and belong to the same party. Hence the necessity, in order to impress a fund with a trust on this ground, to establish its identity with the property or fund which was originally subject to the trust. Third Nat. Bank of St. Paul v. Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440.

Had it appeared in this case that the wheat checks, in paying which Alme's money was used, had been issued by, and constituted outstanding obligations of, the Thorpe Elevator, and that by the purchase of them that company becomes the debtor of Melbye, and that the draft or check on that company for $385 was received or drawn as payment of the amount due Melbye on the wheat checks by him purchased with the intervenor's money, we are by no means prepared to hold that the avails of the intervenor's money would not have been sufficiently traced and identified with the deposit so as to impress the deposit with a trust in favor of the intervenor to the extent of $385. But evidence tending to prove any such facts was entirely lacking. The facts do not bring the case within the doctrine of any of the four lines of decisions referred to in Bishop v. Mahoney, 70 Minn. 238, 73 N. W. 6, unless possibly the fourth, which has now little or no support in any well-considered cases, and would not be followed or adopted by this court.

Order reversed, and a new trial granted.

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J. E. GREENMAN v. O. C. MELBYE.

December 15, 1899.

Nos. 11,834—(143).

Appeal Dismissed.

Appeal dismissed because the proper persons were not made parties to the appeal.

Action in the district court for Clay county against O. C. Melbye, defendant, and the First National Bank of St. Paul, garnishee. Thore Alme intervened as claimant of funds disclosed by the garnishee to the amount of $401.55. The issues between the intervenor and plaintiff were tried before Baxter, J., who found that the intervenor was not entitled to judgment, and that the garnishee was not liable to either of the other parties. From an order denying a motion for a new trial, plaintiff appealed. Dismissed.

Tillotson & Campbell and *Oscar Hallam*, for appellant.

C. A. Nye, for respondent.

MITCHELL, J.

The history of this case is closely connected with that of Twohy Mercantile Co. v. Melbye, supra, page 357. Two or three days after the Twohy Mercantile Company had garnished the First National Bank of St. Paul, the defendant Melbye deposited with that bank the further sum of $110. This, of course, was not subject to the Twohy Mercantile Company's garnishment. Some weeks later the plaintiff brought this action against Melbye, and also garnished the First National Bank. In these garnishee proceedings Alme intervened, and made the same claim to the money as in the Twohy Mercantile Company's action. The court held that the intervenor was not entitled to the judgment claimed by him in his complaint, nor for any judgment in this action, and that the garnishee was not liable in this action to either of the other parties; by which, we assume, was meant the plaintiff and the intervenor. It appears from the findings of fact that the reason why the court held that the intervenor was not entitled to any judgment in this action was

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that he had got what he was entitled to in the action of the Twohy Mercantile Company. From an order denying his motion for a new trial, the plaintiff appealed, but made only the intervenor a party to the appeal.

No reason is perceived why the plaintiff was not entitled to judgment against the garnishee for $110, but we cannot consider that question, for the reason that neither the defendant nor the garnishee is before the court. Under the decision of the court, the intervenor has no interest in the fund garnished. As respects the intervenor, the decision of the court was wholly in appellant's favor. If it was erroneously in favor of the defendant or the garnishee, or both, they should have been made parties to the appeal.

Appeal dismissed.

STATE v. JOHN SMITH.

December 15, 1899.

Nos. 11,881—(22).

Trial of Challenges to Jurors.

Held, that the record shows that the defendant consented to the trial by the court of challenges to jurors for actual bias.

Indictment for Manslaughter.

The indictment construed as one for manslaughter in the first degree, and not for murder in the second degree. The words "wilfully killed" are not the equivalent of "with a design to effect death."

Evidence—Results of Experiments.

The admission in evidence of the results of experiments tending to corroborate the testimony of witnesses for the state that they saw and heard certain things from a particular position, *held* not prejudicial error, for the reasons—First, that the experiments tended to prove nothing that was not self-evident from photographs and measurements already in evidence; and, second, that an attempt had been made to impeach the witnesses by eliciting on their cross-examination facts tending to show that they could not have seen and heard what they testified to from the position which they occupied.

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Names Indorsed on Indictment—Witnesses.

The state is not required to call and examine as its witnesses all persons whose names are indorsed on the indictment. The most that was ever required, in any event, was that they be present in court, so that the defendant may call and examine them if he desires.

Eyewitnesses in Felony Cases.

The general doctrine of the courts now is that, the reason having ceased, the old rule has ceased, that on trials for felony the prosecutor is bound to call and examine all the eyewitnesses of the res gestæ or transaction. But, without deciding this question, *held* that, in this case, the court was justified in refusing to require the state to call certain parties as witnesses, because it did not appear that they were eyewitnesses of the transaction which was the subject of investigation.

Verdict Sustained by Evidence.

The evidence *held* sufficient to justify the verdict.

Defendant was indicted in the district court for Kittson county for manslaughter in the first degree. The case was tried before Watts, J., and a jury, and resulted in a verdict of guilty of manslaughter in the second degree. From an order denying a motion for a new trial, defendant appealed. Affirmed.

H. Steenerson and *E. C. Yetter*, for appellant.

W. B. Douglas, Attorney General, *R. R. Hedenberg*, County Attorney, and *James A. Peterson*, for the State.

MITCHELL, J.

The defendant was convicted of manslaughter in the second degree, upon the following indictment:

"John Smith is accused by the grand jury of the county of Kittson, in the state of Minnesota, by this indictment, of the crime of manslaughter in the first degree, committed as follows: The said John Smith, on the 8th day of March, A. D. 1899, at the village of St. Vincent, in the county of Kittson and state of Minnesota, did then and there wilfully, unlawfully, and feloniously, and in the heat of passion, and in a cruel and unusual manner, kill a human being, to wit: one George Bates, by then and there striking him, the said George Bates, with a blunt and dangerous weapon, a more particular description of which weapon is to the said grand jury unknown, then and thereby inflicting upon the head of him, the said George Bates, wounds, from which wounds the said George Bates died at the village of Pembina, in the county of Pembina, state of North Dakota, on the 9th of March, A. D. 1899; contrary," etc.

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1. The first assignment of error is that the court erred in trying the challenge to one of the jurors for actual bias. The following is all that the record contains relating to this point:

"Ed. Chase challenged for actual bias. Challenge denied. [Then follows the examination of juror upon the cause of the challenge.] Challenge submitted. Sustained by the court."

This can admit of but one reasonable construction, viz., that no triors were appointed, and both parties consented that the challenge should be tried by the court, which may be done in cases not capital. G. S. 1894, § 7374.

2. The second assignment is that the court erred in disallowing defendant's sixth peremptory challenge. The correctness of the ruling depends upon the question whether the indictment charges manslaughter or murder in the first or second degree, they being the only two crimes in which the defendant is entitled to more than five peremptory challenges. It is not and could not be claimed that the indictment charges murder in the first degree. The only definition of murder in the second degree having any bearing on the present case is:

"Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation and premeditation." G. S. 1894, § 6438.

Counsel's argument on this point is wholly based on the peculiar language of the indictment, which it must be admitted is not in the most approved form. They argue that "wilfully killed" means the same as "with a design to effect death." In criminal law, at least, the one is not the equivalent of the other. A man may wilfully do an act which causes death, and yet have no design to effect death.

3. The next assignment is that the court erred in overruling defendant's objection to any testimony being introduced under the indictment, "for the reason that the same did not state a public offense, and alleges an impossible charge." This is based on a mere verbal criticism on the allegations as to dates. In contemplation of law, the defendant committed the crime in this state on the 8th, although the deceased died in the state of North Dakota on the 9th,

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of the month. The crime was committed in this state. State v. Gessert, 21 Minn. 369.

4. On the trial the state introduced as witnesses two young women, who on the night of the alleged homicide occupied a room in the second story of a hotel distant about 57 feet from defendant's saloon (near which the deceased received the injuries of which he died), and who testified that, on being awakened by the noise outside, they looked out of a ventilator in the storm window, and saw and heard an altercation and scuffle between two men on the sidewalk, the voice of one of whom they recognized as that of the defendant. One of the evident purposes of the cross-examination of these witnesses was to impeach their testimony by eliciting facts tending to show that they could not have seen or heard what they claimed to have done from their position at the window. There was also introduced in evidence a photograph of the locus in quo, accompanied by measurements of the distances between the various points referred to in the testimony of the young women. The state then introduced a witness who had made two experiments to ascertain how far and what points he could see from this same window, and, against the objection of the defendant, was allowed to testify as to the results, which tended to corroborate the testimony of the young women as to what they saw and heard. One of these experiments was made a few days after the alleged homicide, by looking through the ventilator in the outer or storm window, precisely as the young women testified to having done. The other was made shortly before the trial, after the storm window had been removed, and the witness raised the permanent window two or three inches, and looked and listened through the opening. The only evidence as to the result of the second experiment was that the witness distinctly recognized the defendant's voice while conversing in an ordinary tone of voice in front of his house,—a distance as great as or greater than that at which the girls testified to have heard it.

The admission of the evidence as to the results of these experiments is assigned as error. This was not prejudicial error, for at least two reasons: First. The evidence did not tend to establish any fact that was not already self-evident from the photographs and measurements in evidence. Second. The defendant had the

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right to impeach the testimony of the young women by showing, as the result of experiments, that they could not have seen and heard from this window what they testified to. If he had done so, it would have been competent for the state to show by experiments that they could have seen and heard it. But it can make no difference whether the defendant attempted to impeach their evidence by actual experiments, or by other evidence tending to show that it was physically impossible for them to see what they testified to. As to the alleged change of conditions at the second experiment, it was not material as respects the testimony elicited, to wit, the distance at which defendant's voice could be recognized by one familiar with it.

5. The twelfth and thirteenth assignments of error are that the court erred in denying the defendant's motion that the state be required to call and examine Lina Brandon and Earl Jarvis, whose names were indorsed on the indictment. From the record it appears that the motion was not that the state should produce them in court, so that defendant might examine them as his witnesses, but that it should be required to examine them as its own witnesses, and the sole ground upon which the motion was based was that their names were on the back of the indictment. It is a sufficient answer to this point to say that it never was the rule that the prosecutor was bound to call all the witnesses on the back of the bill. All that was ever required, even at common law, was that he should present them in court, in order that the prisoner might examine them as his own witnesses if he desired. 1 Archbold, Crim. Pr. & Pl. 583. Although perhaps not material, it may be added that it appears that Jarvis was present, and was in fact called and examined by the defendant; also that Brandon was defendant's sister-in-law, and a member of his family.

What has been said fully disposes of the assignments of error, but in their brief counsel argue them upon another ground, to wit, that it was the bounden duty of the state to call all the eyewitnesses of the transaction or res gestæ. The old rule thus invoked had its origin at a time when a party accused of a felony was not permitted to introduce witnesses at all. Hence the justice of the rule adopted by the judges that the prosecution must introduce all

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the eyewitnesses of the transaction. But now the accused has not only the right to introduce witnesses in his own behalf, but also to compulsory process, at the expense of the state, to compel their attendance. The general doctrine of the courts now is that, the reason having ceased, the rule has also ceased, and that now the state, like any other party, is permitted either to call, or to decline to call, any competent witness. So far as we can discover from a somewhat hasty examination of the authorities, Michigan seems to be the only jurisdiction holding to the contrary. As a prosecuting officer represents the public interest, and should try a case rather as a minister of justice than as a partisan, there may be circumstances where it would be wrong for him to decline to call a witness favorable to the defendant, and doubtless, in such a case, the court, on its own motion, might require the witness to be called and examined. But, without determining whether the old rule still obtains either in whole or in part, it is sufficient for the present case to say that it was nowhere made to appear that either of these parties were eyewitnesses of the transaction. Indeed, it affirmatively appears, if he is to be believed, that Jarvis was not.

6. The defendant further contends that the court erred in charging the jury that

"If the defendant, without it being necessary to defend himself, wilfully pushed the person killed off the sidewalk, or struck him and knocked him down, so that he received the injuries from which he died, it would be manslaughter in the first degree."

The court did not so charge. What he charged was that it would be manslaughter in the second degree. The only ground upon which it is claimed that the charge was erroneous is that there was no evidence upon which to base it. But this assignment of error cannot be considered, because there was no sufficient exception to the charge to raise the point. The only exception which, by any possibility, could refer to it, was, "Defendant excepts to the court's charge with reference to the degree of manslaughter."

7. The only other assignments of error worthy of consideration may be considered together, as they go to the sufficiency of the evidence to justify the verdict. We shall not attempt to do anything

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more than to refer to a few of the more salient features of the evidence.

It is practically undisputed that on the afternoon of the 8th the deceased came into defendant's saloon with a sample case containing samples of cloth for men's garments, and also with two hats, which he wished to sell; that he sold one of them for a dollar to a person who was in the saloon, and traded the other to the defendant for the agreed consideration of a bottle of whiskey; that he was so intoxicated that he fell out of his chair, and lay asleep on the floor, until about 11 o'clock, when defendant aroused him, and told him that it was time to leave, as he (defendant) wished to shut up; that the deceased then requested defendant to give him his bottle of whiskey; that defendant refused to do so, giving as a reason that the deceased already had enough, and that he would give it to him some other time; that deceased then demanded the return of the hat; that, upon defendant's refusal to return it, the deceased attempted to take it by force; that thereupon the defendant ejected the deceased by force, and fastened the door behind him; that deceased refused to leave, but continued on the sidewalk in front of the saloon, pounding on the door and window, swearing and demanding his hat. This was the last that was seen of the deceased before he received the injuries of which he died.

Then followed the testimony of the two young women, already referred to, who, on being aroused by the noise on the sidewalk, got up, and looked out of the window. It was too dark for them to recognize any one by sight, or to see distinctly what occurred, but they testified to seeing the figures of two men on the sidewalk engaged in an altercation of words and in a scuffle; that they distinctly recognized the voice of one of the men as that of the defendant, with whom they were quite well acquainted; that they saw one of the men fall down and get up again, and soon fall down again, after which he did not rise. Their testimony has the air of truthfulness and probability. The next scene in the transaction disclosed by the evidence is that, shortly before 12 o'clock, Lina Brandon, the sister-in-law of defendant, and a member of his family, went over to the house of a neighbor named Hanson, and requested him to come over quick, that "Bates was nearly killed." Hanson got up, and went

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over, and found the deceased lying unconscious and bleeding about in front of defendant's saloon, with his head out in the street, and his feet on the sidewalk, and his necktie and bloody collar lying within a short distance from his head. The ground was frozen and covered with snow, but there is no evidence that the surface of the street was rough, or contained any projecting objects, at the place where the deceased fell. Quite a number of the residents of the vicinity, of whom defendant was not one, soon congregated, as was natural, under the circumstances, and the result was that among them they obtained a team, and conveyed the deceased to his residence, over in Pembina, where he died that night.

All the physicians who took part in the autopsy testified that they found that deceased had sustained two fractures of the skull, and, on the same side, a fracture of the cheek bone; that, in their opinion, these injuries were caused by a blow or blows from some blunt instrument; and that these injuries caused his death. It is true that on cross-examination they testified that the injuries might have been caused by the deceased's falling from the sidewalk into the street under certain special circumstances, as, for example, if he was at the time in very rapid motion, and fell upon some hard object with very great violence. But it is evident that they admitted this as a mere possibility, and not a probability,—a fact which, in view of the severity of the injuries, would be apparent to any layman, especially where the injured person was at the time intoxicated, and consequently his muscles relaxed.

Any one accustomed to weighing evidence cannot read the record without being fully impressed with the conviction that the defendant and his family must have known more about the facts of the case than is disclosed by the evidence. Neither his wife nor his sister-in-law were called as witnesses. His own testimony was in some respects highly improbable, and on a number of material points flatly contradicted by other witnesses. He denied or evaded the trade of the hat for whiskey,—a fact which was testified to by some of his own witnesses, and is corroborated by many of the surrounding circumstances. According to his testimony, he did not at any time during the evening go out of the building after he ejected the deceased, not even to ascertain how badly he was injured, or to

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assist in taking care of him,—a course of conduct difficult to account for, except on the ground of a consciousness that he was in some way connected with causing the injuries. He also testified that he did not know that the deceased was seriously injured, or that his sister-in-law had gone over after Hanson, until the next morning,—a statement which, under the circumstances, is rather incredible. Other facts and circumstances might be referred to, but, without discussing the evidence further, we are satisfied that it was sufficient, even in a criminal case, to justify the verdict. This disposes of all the assignments of error of sufficient importance to be worthy of special notice.

Order denying a new trial is affirmed, and the cause remanded for judgment and sentence in accordance with the verdict.

McCORMICK HARVESTING MACHINE COMPANY v. JOHN H. BALFANY.

78 370
86 288

December 15, 1899.

Nos. 11,904—(168).

Sale of Chattel—Delivery—Action for Price.

Before a seller can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained.

Constructive Delivery.

In the case at bar the purchaser refused to accept the chattel, and there was no actual delivery. *Held*, on the undisputed facts, that there was no constructive delivery.

Action in the district court for Redwood county to recover $135, the price of a harvester and binder. The case was tried before Webber, J., and a jury, which rendered a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

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Frank Clague and *Somerville & Olsen*, for appellant.
Seward & Burchard, for respondent.

COLLINS, J.

We assume that when plaintiff, through its agents, who went to defendant's house for that purpose, procured and received the orders signed by defendant, made out on one of plaintiff's blanks, and furnished to defendant a copy thereof, there was an acceptance by plaintiff of defendant's proposition to buy a machine, and thus the order became a complete executory contract, as between these parties; the plaintiff agreeing to sell, and the defendant agreeing to buy, the "right-hand" machine therein described. See Kessler v. Smith, 42 Minn. 494, 44 N. W. 794. This contract bore date April 15, 1898, and required that plaintiff should ship the machine to defendant, consigned to the care of Gebhard & Ruth, plaintiff's local agents, at Lamberton, Minnesota, on or about July 15 of that year.

Now, the undisputed testimony is that something over 60 of these machines, alike in every respect, were shipped by plaintiff to these local agents, reaching Lamberton about July 15. Part of them were unloaded from the cars, and taken to the agents' place of business or sheds, where about six of the number were unpacked and set up ready for delivery. Defendant was at the sheds soon afterwards, and was told that the machine he had ordered was ready. His reply was that he wanted a "left-hand" machine, and would not take a "right-hand." He positively refused to take a machine answering the requirements of the order, and also positively refused to settle, either by paying in cash or by giving his notes. No particular machine was designated or marked as for defendant when the lot was shipped by plaintiff, none was consigned to him in care of the local agents or otherwise, and none was set apart or pointed out to defendant as the one he had ordered when he was at the agents' place of business. Nor did the local agents designate or set apart any particular machine at any time as defendant's, although they have constantly kept on their premises, ready for delivery to him, a machine complying in all respects with the description in the order.

There was no actual delivery of a machine to defendant; for he expressly refused to take possession, and plaintiff cannot recover the contract price therefor, unless the facts as shown prove that

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there was a constructive delivery to him. Jones v. Schneider, 22 Minn. 279. Before a seller can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title, and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained. Newmark, Sales, § 391; 21 Am. & Eng. Enc. 576. See also Rail v. Little Falls Lumber Co., 47 Minn. 422, 50 N. W. 471.

The facts now before us show conclusively that there was no constructive delivery of a machine to defendant. The order, in terms, authorized the plaintiff to select and appropriate a machine to the contract, and to defendant, by designating the same, and it expressly directed that it be consigned to him in care of the local agents. But this was not done. There was no designation of any machine as defendant's; and none consigned to him. Nor was there at any time an appropriation of any particular machine by the agents to defendant's contract out of the large number which had been received at their place of business. The machine was not specified to which the contract would attach, or, in legal phrase, there was no appropriation of a machine to defendant, or to his contract, and no property passed. Stating to defendant that his machine was ready to be delivered, and pointing to a number then on hand, either of which would comply with the terms of the order, did not amount to constructive delivery of any particular machine, nor was there any act on plaintiff's part which would pass the title so as to vest it in defendant, and thus authorize a recovery of the contract price. The result of permitting such a recovery would be nothing more or less than enforcing specific performance of a contract for the sale and delivery of chattels, contrary to the general rule.

As on the evidence the plaintiff could not recover the contract price, it is not necessary to consider or pass upon that part of the charge which bore upon the alleged "countermand" of the order.

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If there was error on this point (see Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756), it was error without prejudice.

Order affirmed.

ADONIRAM CLARK v. CHARLES BUTTS and Others.

December 15, 1899.

Nos. 11,912—(85).

Deed—Finding Sustained by Evidence.

The evidence *held* sufficient to justify a finding that a deed contained the name of a grantee when it was executed by the grantor.

Name of Grantee—Evidence of Grantor—Absence of Deed.

Where the issue is as to whether a deed contained the name of a grantee when delivered, the testimony of the grantor as to the fact is competent, although at the time of testifying the deed was not presented to the witness for inspection; there being no dispute as to the identity of the deed referred to.

Redemption by Owner.

Where the owner of premises assumes to redeem them as creditor under a judgment against a former owner, in law the redemption will be one by an owner, and not by a creditor, and its legal effect will be to annul the sale from which the redemption is made.

Action in the district court for Ramsey county to determine adverse claims. The question whether the deed, referred to in the opinion, contained, when signed and acknowledged, the name of Charles Butts as grantee was submitted to a jury, which found in the affirmative. The other facts and issues were determined by the court, Otis, J., who adopted the verdict, and found as conclusions of law, among other things, that the redemption by defendants Butts and Jaques was valid and operative as a redemption by them as owners, and not as judgment creditors, and that the foreclosure sale was thereby annulled; and that plaintiff had no title or estate in the premises, but had a lien by virtue of his mortgage for the amount remaining due thereon. From an order denying a motion for judgment notwithstanding the verdict or for a new trial, de-

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fendants Butts and Jaques, and defendant Browning, who claimed under them, appealed. Affirmed.

Walter L. Chapin, for appellants.

How & Butler, for respondent.

MITCHELL, J.

This case was before us on a former appeal, and most of the questions involved were settled by the decision then rendered, to which reference is here made for a statement of the facts. Clark v. Butts, 73 Minn. 361, 76 N. W. 199. On the first trial the court below found that the deed from the Watermans, executed in September, 1892, did not, when delivered, contain the name of any grantee, and this court held that it was error, upon this state of facts, to hold that the deed conveyed the land to Butts; that a deed executed in blank as to the grantee is, as between the immediate parties, of no force or effect. On the second trial the court ordered the following specific question of fact to be tried by a jury, viz.:

"Did the paper writing marked 'Plaintiff's Ex. F.' [the deed in question], at the time it was signed and acknowledged by Elizabeth J. Waterman, contain the name of Charles Butts as grantee?"

The jury answered the question in the affirmative, and the court adopted this answer as a finding in the case, and further found that at the time of its delivery the deed was in the same condition as when signed and acknowledged by Mrs. Waterman. The importance of this finding lies in the fact that it follows from it, as a conclusion of law, that Butts and Jaques redeemed as owners, and not as creditors, and their redemption annulled the foreclosure sale, instead of operating as an assignment of the rights acquired under it. The principal question on this appeal is whether the evidence justified the finding.

A brief history of the transaction may not be out of place: The Watermans and their co-tenant, George, had executed a mortgage on the premises to the plaintiff to secure $3,500 and interest. The plaintiff had unwisely foreclosed this mortgage merely for an instalment of interest amounting to something over $200, and at the sale the property had been bought by one Wilmot for that amount. Prior to the expiration of the period for redemption, Mrs. Water-

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man, who in the meantime had become the owner of the undivided half of the premises formerly owned by her husband, agreed to sell her equity to Butts and Jaques for $400, out of which was to be deducted $204, which her husband owed them on a promissory note, the balance to be paid her in cash. In pursuance of this agreement she executed and delivered to Butts the deed in question, and Butts and Jaques paid her the $196. But it being a part of the plan or scheme of Butts and Jaques to put themselves in a position to redeem as creditors, and thus extinguish the lien of plaintiff's mortgage, it was part of the agreement between them and Mrs. Waterman that they should retain the note referred to, bring suit upon it against her, and that she should permit them to obtain judgment upon it, so that they might use the judgment for the purpose of redeeming the land. They obtained the judgment as agreed, and it was upon this judgment that they claimed to redeem.

The most hotly contested question on the trial was whether, when the deed from Mrs. Waterman was delivered to Butts, it contained his name as grantee, which had been subsequently erased or obliterated, or whether the place for the name of the grantee was blank. As the sufficiency of the evidence to support the finding of the court and jury is purely a question of fact, it would subserve no good purpose as a precedent to discuss the evidence at length. Moreover, the evidence is so voluminous, and contains so many facts and circumstances bearing collaterally upon the issue, by way of corroborating or refuting the contentions of the respective parties, that anything like a full discussion and analysis of it would be impossible,—at least, within any reasonable space. We must therefore content ourselves with saying that we have carefully read and considered the entire record, and have come to the conclusion, although not without some hesitancy, that the evidence fairly made a case for the jury, and that we would not be justified in disturbing their verdict, especially in view of the fact that the learned judge who presided at the trial has refused to do so, and that the case, in some of its aspects, was one where the appearance of the witnesses and their manner of testifying on the stand might properly be entitled to considerable weight.

2. Mrs. Waterman being a nonresident of the state, her testi-

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mony was taken by deposition, both parties appearing and taking part in her examination. The gist of her testimony was that the name of Butts was inserted as grantee before she executed and delivered the deed in question. When her deposition was offered on the trial, her testimony as to the condition and contents of the deed when delivered was objected to on the ground that the instrument was not produced and exhibited to her at the time she was giving her testimony, and that no notice had been served on the defendants to produce it for that purpose.

We are not aware of any rule of evidence requiring this to be done in cases of this kind, nor have we been referred to any authority so holding. Oral evidence is admissible to prove the alteration of an instrument, and, when the issue is whether an instrument has been altered after execution, it is, generally speaking, competent to introduce the testimony of those who read and examined it at the time of its execution, or at any time when it was in a condition different from its present one. The fact that the witness has the instrument before him for inspection at the time he is giving his testimony may refresh his memory, and thus add weight to his evidence; but this, as a general rule, goes to the weight, and not to the competency, of his testimony. Where experts are called to give an opinion, based on the present condition and appearance of an instrument, as to whether or not an alteration has been made in the writing, it may be necessary, from the very nature of the evidence, that the instrument should be presented for the inspection of the witness while testifying; but that is not this case. What Mrs. Waterman testified to was as to her reading the deed at the time she executed it, and seeing in it the name of Butts as grantee, and as to the nature and terms of the transaction between her and Butts and Jaques, as corroborative circumstances. There could have been no surprise on the part of the defendants. This very issue as to whether this deed was in blank when delivered had been hotly contested on the first trial, and the defendants must have known that the deposition was to be taken on this very issue. They had the deed in their possession, and yet went to Milwaukee to participate in the examination without taking the deed with them.

3. The last point urged is that, even conceding that the instru-

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ment was a full and operative deed when delivered, yet, inasmuch as Butts and Jaques assumed to redeem under their judgment as creditors, and not as owners, and as Wilmot was satisfied with the redemption, and treated it as having been made under an established lien by accepting the redemption money, therefore the court should treat it as a redemption by creditors, and not by owners. It is undoubtedly true that Wilmot, the holder of the certificate of sale, had by his conduct accepted and ratified the act of Butts and Jaques as a valid redemption, but the capacity in which they redeemed, and the effect of their redemption, depended on their actual relations to the title of the property, and not on their intention or upon Wilmot's belief. The capacity in which they assumed to redeem was a matter of indifference to the holder of the certificate, if he saw fit to acquiesce in the redemption. If Butts and Jaques were in fact owners, then, in legal effect, they redeemed as owners, whatever their intentions may have been to the contrary, and the legal effect of the redemption was to annul the foreclosure sale. The fact that plaintiff's right of redemption as mortgagee may have expired did not change the result.

Order affirmed.

STATE ex rel. JOHN ZASKE v. AUGUST L. MATTER.

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December 15, 1899.

Nos. 11,961—(220).

Habeas Corpus—Judgment—Jurisdiction.

The rule applied, that, where a party is held in custody under the final judgment of a court of competent jurisdiction, only jurisdictional defects, which render the judgment absolutely void, can be inquired into on habeas corpus.

Writ of habeas corpus issued by the district court for Brown county and directed to respondent as sheriff of said county. From an order, S. A. George, court commissioner, remanding relator to the custody of respondent, relator appealed. Writ discharged.

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Jos. A. Eckstein and *A. Frederickson*, for appellant.

Somerville & Olsen and *Geo. T. Olsen*, County Attorney, for respondent.

MITCHELL, J.

In an action for bastardy, under G. S. 1894, c. 17, the relator, a minor aged 17 years, upon a verdict of guilty, was by a judgment of the court adjudged to be the father of the child, and charged with the maintenance thereof, in the sum of $8 per month, until the child arrived at the age of 15 years, the same to be paid monthly into the county treasury; also, that he should within 10 days pay to the mother the sum of $40; that he pay the costs of the prosecution, taxed at $67.19; and, further, that he give a bond in the sum of $1,500, with approved securities, for the performance of the judgment; and that he should be confined in the county jail until he complied with the provisions of the judgment. Having failed to comply with the judgment, he was committed to the county jail, under the custody of the respondent, as sheriff. After having been imprisoned more than 90 days, he applied for his discharge, under the provisions of G. S. 1894, § 2046.

It appeared upon the hearing that he was unable to pay the money already due under the judgment, or to give the bond required by it; also, that he had no money or property, except an undivided interest in the estate of his father, which had not yet been assigned to him,—the estate being still in process of administration, and the time for filing of claims not having expired. The estate of his father consisted of real estate, 80 acres of which had been his homestead, and was still occupied as such by his widow and children, including the relator. Upon this state of facts, the court entered an order or judgment, the substance of which was that the relator should be discharged upon executing, through the medium of a guardian to be appointed by the probate court, to the board of county commissioners, a deed of all his interest in his father's estate, in trust for the payment of all sums due or to become due under the original order or judgment of the court, and that until this was done he should be remanded to the custody of the sheriff under the original commitment. He refused to comply with the terms and conditions of this order, but sued out a writ of habeas corpus.

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Upon the hearing on the writ he was remanded to the custody of the sheriff, whereupon he appealed to this court, where the appeal has been submitted on the evidence introduced in the court below, which shows the foregoing state of facts.

The relator has mistaken his remedy. On habeas corpus, only such radical defects of a jurisdictional character as render the proceedings absolutely void, and not merely voidable, can be inquired into. Jurisdiction is the power to hear and determine a cause. The existence or nonexistence of this jurisdiction may always be inquired into, but, where it exists, the question whether it was exercised correctly or erroneously will not be inquired into on habeas corpus, where the relator is held under the final judgment of a court of competent jurisdiction. The writ cannot be made a substitute for an appeal or a writ of error. In this case the court had jurisdiction of both the cause and the parties. It therefore had the power to hear and determine the cause. However erroneous the decision may have been, it was not void for want of jurisdiction. If erroneous, relator's remedy is by appeal, or, in case no right of appeal is given by statute, by writ of certiorari. State v. Kinmore, 54 Minn. 135, 55 N. W. 830; In re Williams, 39 Minn. 172, 39 N. W. 65; State v. Sheriff of Hennepin Co., 24 Minn. 87; State v. McMahon, 69 Minn. 265, 72 N. W. 79; State v. Norby, 69 Minn. 451, 72 N. W. 703; State v. Wolfer, 68 Minn. 465, 71 N. W. 681.

Writ discharged, and the relator remanded to the custody of the sheriff of Brown county.

TORKEL THOMPSON v. DAVID L. THOMPSON.

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f88 501

December 18, 1899.

Nos. 11,863—(163).

Grain—Warehouse Receipt—Insurance.

A storage receipt for wheat delivered at a public elevator, after stating the rate of storage, contained the following clause: "This charge for storage shall cover loss by fire only; all other damage, by the elements, or by heating, or riot, or by the act of God, or which in any way has

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been caused by the holder of this receipt, shall be excepted." *Held*, this, by implication, constituted a contract of insurance by the warehouseman against loss by fire.

Modification of Contract.

Held, by a subsequent agreement modifying the contract so as to provide that no charge should thereafter be made for storing the grain, this implication dropped out, and thereafter the warehouseman was not such insurer.

Receipt—Variation by Parol Agreement.

Held, such storage receipt, signed by the agent of the warehouseman, constituted a written contract, the terms of which could not be varied by a prior or contemporaneous verbal contract.

Same.

The defendant, Thompson, was doing business in the name of Smith & Thompson, and the storage receipt was signed in that name. *Held*, the terms of the receipt cannot for that reason be varied by parol, except so far as to explain the fact that defendant was doing business under such firm name.

G. S. 1894, § 7646.

Held, G. S. 1894, § 7646, requiring a storage receipt, reciting certain facts, to be issued when the grain is deposited, does not prohibit a subsequent modification of such receipt by an independent verbal agreement.

Consideration.

Held, there was sufficient consideration for such a modification.

Rate of Storage.

The storage receipt provided that the rate of storage "shall not exceed four cents for six months." *Held*, this was intended to fix the rate of storage, and not the duration of the bailment.

Assignment of Receipt.

Held, such contract of insurance passed by a transfer of the storage receipt.

On Reargument.

January 31, 1900.

Upon reargument of this case this court recedes from its former ruling, and now holds that a receipt issued under the provisions of G. S. 1894, § 7646, for the storage of grain, cannot be subsequently modified or changed by parol.

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Action in the district court for Dakota county to recover the amount of loss arising from destruction by fire of 15,642 bushels of wheat stored in defendant's elevator. The case was tried before Crosby, J., who found in favor of defendant; and from a judgment entered pursuant to the findings, plaintiff appealed. Reversed.

E. T. Young, for appellant.

Hodgson & Schaller and *W. H. De Kay*, for respondent.

CANTY, J.

Smith & Thompson were operating a public elevator for the storage of grain at Appleton, Minnesota, for some time prior to the death of Smith, in June, 1894. After his death, Thompson, this defendant, operated the elevator until it and its contents were destroyed by fire, on June 30, 1896. At the time of the fire there were stored in the elevator 19,034 bushels of No. 1 wheat, all intermingled in a common mass. At that time plaintiff had in store in the elevator 4,125 bushels of this wheat, for which he held storage receipts. Other persons held storage receipts for other portions of the wheat, amounting to 11,517 bushels; and these receipts were transferred to plaintiff after the wheat was so destroyed, but before the commencement of this action. This action was brought to recover the value of all of said 15,642 bushels of wheat, under the claim that, by the contract of storage, defendant had insured all of this wheat against loss by fire while so stored. On the trial before the court, sitting without a jury, the court found for defendant, and plaintiff appeals from the judgment.

One Sinnott was the agent of Smith & Thompson in managing the business, and continued to be the agent of defendant, Thompson, after the death of Smith. So far as here material, the printed blank form of storage receipt used by Smith & Thompson was as follows:

"La Grange Elevator of Appleton, Minn.
"Smith & Thompson, Proprietors.
"——— bush. no. ——— wheat ———. price, ——— cents.
"Received in store ———, 189–, account of ——— or order, ——— bushels no. ——— wheat.
"Which amount, kind, and grade of grain will be delivered to the holder of this receipt, upon surrender thereof, subject to the following conditions as to storage, etc.: The first 15 days from date here-

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of, or fractional part thereof, one-half cent per bushel, but shall not exceed four cents for six months. This charge for storage shall cover loss by fire only; all other damage, by the elements, or by heating, or riot, or by the act of God, or which in any way has been caused by the holder of this receipt, shall be excepted. * * *

"Smith & Thompson, Proprietors.

"By T. Sinnott."

Defendant, Thompson, used these same blank forms when issuing receipts, and the same were signed, after the printed signature, "Smith & Thompson, Proprietors," as follows: "By T. Sinnott." All of the receipts here in question, issued for said 15,642 bushels of wheat, were in this form; and plaintiff relies on the words, "This charge for storage shall cover loss by fire only," as constituting the contract of insurance against fire, by which he claims defendant is liable for the value of the wheat.

1. In our opinion, the clause does constitute such a contract.

2. To avoid the effect of this, the defendant pleaded in his answer that before the fire, and after the delivery of the wheat and the issuing of the storage receipts in the various instances, he entered into a subsequent and independent contract with each of the holders of such receipts, whereby it was agreed that defendant should thereafter store the wheat free of charge for a specified length of time in each case, during which time the fire occurred. In our opinion, the defendant thereby pleaded a good defense. Such contract for insurance arose merely by implication from the language used, and, if no charge was made for storage, this implication would drop out. In other words, there being no charge for insurance, it would, under the peculiar language used, mean that there was to be no insurance.

3. But each of the receipts so issued constitute a written contract, the terms of which cannot be varied by an oral agreement made at or prior to the time the receipt was issued. The application of this rule to this case leads to reversal.

The trial court ordered judgment for defendant, but neither the findings nor evidence will support the judgment which was entered pursuant to that order. The court found that an agreement was made between defendant and each of the persons depositing grain or holding storage receipts that defendant should thereafter store

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the wheat free of charge, as aforesaid. But, as to part of the wheat, the court found that the agreement was made when the wheat was deposited. As to another part, the court failed to find whether the agreement was made before, or at the time of, or after the wheat was deposited and the receipts issued. As to the rest of the wheat, the court found that the oral agreement was made after the wheat was deposited and the receipts issued; but the finding is not sustained by the evidence, which is to the effect that a portion of this part of the wheat was deposited before the oral agreement was made respecting it, and a portion after the same was made. Neither does it appear from the evidence how much was deposited before, and how much after, such oral agreement was made. In fact, with respect to the greater part of the wheat, the evidence is much confused as to whether the oral agreements were made before, at the time of, or after the storage receipts were issued. Much of this evidence is not competent in the absence of a counterclaim in the answer seeking to have reformed the receipts to which the evidence applies, as the effect of the evidence would be to vary the terms of a written contract by parol, and not to prove a subsequent oral modification of a written contract.

4. The fact that defendant was doing business in the name of Smith & Thompson does not, beyond the explanation of that fact, affect the rule that the written contract contained in the storage receipt cannot be varied or contradicted by a prior or contemporaneous verbal agreement.

5. G. S. 1894, § 7646, provides:

"Whenever any grain shall be deposited in any warehouse, elevator, or other depository, for storage, the bailee thereof shall issue and deliver to the person so storing the same, a receipt or other written instrument, which shall, in clear terms, state the amount, kind and grade of the grain stored, the terms of storage," etc.

Appellant contends that by reason of this section the contract contained in the storage receipt cannot be modified by a subsequent verbal contract. We cannot so hold. The statute merely requires that a written receipt, specifying certain facts, shall be delivered when the grain is deposited, and does not prohibit the subsequent modification of such receipt by an independent verbal agreement.

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6. We are of the opinion that there was sufficient consideration for such a subsequent modification of the contract.

7. Neither can we hold that, by virtue of the provision in the storage receipt that the rate of storage "shall not exceed four cents for six months," the contract found in such receipt expired at the end of six months after the receipt was issued, even though the receipt was not surrendered, no effort was made to terminate the contract, and the wheat still remained on deposit. Such provision was intended to fix the rate of storage, and not the duration of the bailment.

8. We are also of the opinion that the contract of insurance passed by a transfer of the storage receipts. This disposes of the case.

Judgment reversed, and a new trial granted.

COLLINS, J.

I dissent from that part of the opinion in which it is held that there may be a subsequent modification of a storage receipt issued under the provisions of G. S. 1894, § 7646, by an independent verbal agreement. The purpose of the statute is to compel warehousemen to put their contracts of storage in writing; and, unless the words "Not negotiable" are plainly stamped across the face of the instrument, its transfer and delivery are equivalent to a transfer and delivery of the property itself. Section 7649. It seems to me that the intent of the legislature was to prohibit and prevent the making of anything but a written contract. This decision will invite and permit the evasion of a very wholesome law. I concur on the other points decided.

BROWN, J.

I agree with Associate Justice COLLINS.

On January 31, 1900, the court rendered the following decision:

LOVELY, J.

This case has, by the direction of the court, been reargued upon the single contention whether the verbal modification of the terms of certain warehouse receipts adopted subsequently to the execution and delivery of the same constituted valid and enforceable contracts under the warehouse laws of this state.

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When the case was previously considered, two members of this court as then constituted—COLLINS and BROWN, JJ.—dissented from the view therein adopted by the majority, viz. that such parol modification might be legally entered into between the original parties, and that the contract, when so modified, might be enforced. But upon further reflection the court were not satisfied that sufficient importance had, in their previous view, been attached to the public nature of the statute under which the receipts had been issued, or that public policy required these receipts to be made an exception to the usual common-law rule which permits written agreements to be changed by subsequent oral consent of the parties. We have fully considered the question involved, and are of the opinion that the ruling of the court upon the former hearing, in the respect referred to, cannot be allowed to remain as the authority of this court; while we adhere otherwise to the result therein reached.

It will not be necessary to set out either the statutes or the facts involved, as they are stated at length in the opinion of Justice CANTY on the former hearing. The particular provision of the warehouse receipts involved related to the charges for storage and the insurance of the grain described therein,—matters which, under the terms of the statute (G. S. 1894, § 7646), are expressly required, by its very terms, to be "in writing." The amount of charges for storage under this law must be stated in the receipt when issued (in this case after the receipts were issued). The obligation to insure in the original contract by the warehouseman on one side was, as claimed, waived by the owner of the receipts upon condition that no charges should be made for storage, which agreement was evidenced only by the verbal understanding of the parties.

The necessity of enforcing the warehouse laws of this state, and particularly those portions providing for the storage of produce, cannot be easily exaggerated. The tickets designating the amount of grain, charge for storage, and the ownership of the property pass from hand to hand among our citizens, in ordinary commercial transactions, in lieu of the grain itself, and are symbolic both of the title which actually passes by such transfers and of the money value which the property is worth at any given time, constituting the warehouseman a bailee of the owner, and subjecting him to

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severe penal consequences should he make misstatements therein, or to prosecution for felony should he dispose of the property intrusted to his care without consent of the owner. In view of the extensive interests involved, which have excited the solicitude and received the constant and earnest attention of the legislature to protect the agricultural interests of this commonwealth, as well as the danger of defeating the objects to be attained by the law, these statutory contracts of bailment should be in writing; should be definite and certain, not only when issued, but definite and certain as long as they continue to represent the title to the property, and so long as they stand for exact money values in the business transactions of daily life. It was a wise purpose of the legislature that led to the enactment of the warehouse laws of this state, and that required receipts issued thereunder to be in writing, and it was evidently the purpose of the lawmakers that no change of such contracts should be made subsequently, unless the same was also expressed in writing; for, while such receipts continue to be contracts of bailment, and negotiable, they should, for the same reasons, continue to be as certain and definite as writing can make them, and ought not to be changed by oral modifications that cannot but involve all transactions with them in uncertainty and confusion, and so destroy their efficiency for the purposes intended by the lawmakers.

There is abundant authority to support the view that a contract which public policy requires to be in writing cannot be changed or modified by parol. State v. Stevenson, 52 Iowa, 701; Sykes v. People, 127 Ill. 117, 19 N. E. 705; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. 239; Seaman v. O'Hara, 29 Mich. 65, 66; Leonard v. Dunton, 51 Ill. 482; Brown v. Sanborn, 21 Minn. 402; Heisley v. Swanstrom, 40 Minn. 196, 41 N. W. 1029; Burns v. Fidelity Real-Estate Co., 52 Minn. 31, 53 N. W. 1017. For the reasons above stated, we hold that the modification of these receipts, made subsequent to their execution, was invalid, and that these contracts must be interpreted upon their original provisions expressed in writing.

Judgment reversed, and new trial granted.

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STATE v. ALFRED BRADFORD.

December 18, 1899.

Nos. 11,890—(27).

Laws 1899, c. 43, § 1.

Laws 1899, c. 43, § 1, construed, and *held* not void for uncertainty.

Same.

Held, the section should be cut down by construction so as to apply only to cases of injuries to public bicycle paths.

Bicycle Paths.

Conceding, without deciding, that, prior to the passage of said chapter 43, the county commissioners had no authority to set apart a portion of a public highway for a bicycle path for the exclusive use of bicycles, *held*, that chapter by implication ratified the act of the commissioners in doing so, or attempting to do so, and also by implication authorized such commissioners thereafter to set apart a portion of a highway for such exclusive use.

Indictment Defective.

Held, the indictment is fatally defective in failing to allege that the bicycle path is a part of a public highway, or a public bicycle path. Rule applied that an indictment is not sufficient which merely follows the language of the statute, when the statute does not sufficiently define the crime, or set forth all of the elements necessary to constitute the offense intended to be punished.

Defendant was indicted in the district court for Hennepin county for driving a team of horses attached to a sled upon a bicycle path. The case was tried before Simpson, J., and a jury, and resulted in a conviction. From an order denying a motion for a new trial, defendant appealed. Reversed.

A. M. Higgins, *L. W. Gammons* and *J. A. Peterson*, for appellant.

Laws 1899, c. 43, § 1, cannot be intelligibly construed. If the act makes it a crime to drive a team of horses attached to a vehicle across a bicycle path constructed exclusively for use of bicyclists, the legislature has exceeded its powers. The legislature can make criminal only what interferes with the morals, health

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and good order of the community. Loan Assn. v. Topeka, 20 Wall. 655. The act is broad enough to cover a path on the land of the person driving across it. See Whiting v. Sheboygan, 25 Wis. 167, 188; Cooley, Const. Lim. 129, 175, 487; 2 Dillon, Mun. Corp. § 587; City of St. Paul v. Gilfillan, 36 Minn. 298; River v. Behr, 77 Mo. 91; Quintini v. Board, 64 Miss. 483; People v. Rosenberg, 138 N. Y. 410; Coe v. Schultz, 47 Barb. 64; Hutton v. City, 38 N. J. L. 122; City v. State, 118 Ind. 426, 447. The statute is too indefinite. There is no description of a "bicycle path" except that it must be made exclusively for use of bicyclists. Dorsey v. State, 38 Tex. Crim. App. 527; City v. Heitzeberg, 141 Mo. 375.

The indictment is insufficient. It is not enough to charge in the words of the statute unless all that is essential to constitute the offense is stated. State v. Howard, 66 Minn. 309, 312; State v. Comfort, 22 Minn. 271; State v. Abrisch, 41 Minn. 41. Nor is it charged that defendant knew it was a bicycle path. State v. Howard, supra.

The portion of the highway in question was not a bicycle path constructed exclusively for the use of bicyclists. Public highways belong to the public, and the public is entitled to free passage along every part not in actual use by some other traveler. 1 Woods, Nuis. § 252; Elliott, Highw. 18; Angell, Highw. § 226; 1 Hawkins, P. C. c. 76, § 49; State v. Berdetta, 73 Ind. 185; Johnson v. Whitefield, 18 Me. 286; Addison, Torts, 328. It is doubtful whether the legislature can restrict the use in the manner here attempted, but there is no legislative enactment authorizing it. The county commissioners having no authority to denominate a part of the highway a bicycle path for the exclusive use of bicyclists, and to exclude the general public therefrom, the part of the highway in question was not a bicycle path constructed for the exclusive use of bicyclists. The board of county commissioners has no powers not expressly delegated. The term "bicycle path" has never been recognized or defined by the laws of this state.

W. B. Douglas, Attorney General, *C. W. Somerby*, Assistant Attorney General, and *A. B. Choate*, for respondent.

The act is sufficiently definite. The nature and purposes of

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bicycle paths are as much matter of common knowledge as are the nature and purpose of sidewalks constructed for the exclusive use of pedestrians. The law is as valid as are laws and ordinances prohibiting the driving of teams on sidewalks, or heavy traffic on public boulevards. The court will give to the act a reasonable construction.

The indictment is sufficient. When a statutory defense is completely defined, an indictment in the language of the statute is sufficient. State v. Comfort, 22 Minn. 271; State v. Barry, 77 Minn. 128; State v. Greenwood, 76 Minn. 207. Courts take judicial notice of the general direction of streets, and their limits, and numbering; and of the location of rivers, cities, sections, towns, and ranges. Skelly v. New York, 7 Misc. (N. Y.) 88; Canavan v. Stuyvesant, 7 Misc. (N. Y.) 113; Sheehan v. Flynn, 59 Minn. 436; 12 Am. & Eng. Enc. 173, 174. "Wilfully" includes "knowingly." State v. Stein, 48 Minn. 466.

The part of the highway in question was a bicycle path constructed exclusively for the use of bicyclists. The building of the path was matter of public record and common knowledge. The power of the commissioners to construct bicycle paths is necessarily implied. The legislature has given them general supervision in improving county roads. The nature and extent of the improvements are for them to decide; and in absence of fraud or demonstrable mistake of fact the courts will not interfere with their determination. G. S. 1894, § 1846; State v. Judges of District Court, 51 Minn. 539.

The purpose of the law was to keep vehicles within their proper limits and to protect bicyclists, and the act is within the police power, and violates no constitutional right. Cook, Pen. Code (N. Y.) §§ 640, note, 652; Fisher v. Village, 133 N. Y. 527; Tiedeman, Lim. Pol. Pow. § 1; State v. Wagner, 45 Iowa, 482; State v. Cargill Co., 77 Minn. 223; Emmons v. Minneapolis & St. L. Ry. Co., 35 Minn. 503; State v. Smith, 58 Minn. 35; Butler v. Chambers, 36 Minn. 69; State v. Horgan, 55 Minn. 183; State v. Mrozinski, 59 Minn. 465; State v. Chapel, 64 Minn. 130; Johnson v. Chicago, M. & St. P. Ry. Co., 29 Minn. 425; Graffty v. City, 107 Ind. 502; Des Moines v. Des Moines, 73 Iowa, 513.

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The purposes and actual construction of a bicycle path may be shown by parol in the same manner that a county road may be so proved, the records not being conclusive. State v. District Ct. of Ramsey Co., 29 Minn. 62, 33 Minn. 164; G. S. 1894, § 1878; Village of Benson v. St. Paul, M. & M. Ry. Co., 62 Minn. 198, 200; Hall v. City of St. Paul, 56 Minn. 428, 431. A county road is a highway, and the commissioners have supervision thereof with power to improve it for travel by ordinary vehicles, horsemen and footmen, and to appropriate money therefor. The nature and extent of the improvement is left to the discretion of the board. G. S. 1894, §§ 1832, 1838, 1846; Cater v. N. W. Telephone Ex. Co., 60 Minn. 539; Gillette-Herzog Mnfg. Co. v. Board of Co. Commrs., 69 Minn. 297; Carli v. Stillwater St. Ry. & T. Co., 28 Minn. 373; Elliott, Roads & S. 300–304; 9 Am. & Eng. Enc. 363. A bicycle is a vehicle, may be used on a public highway, and is governed by the law of the road. State v. Collins, 16 R. I. 371; Thompson v. Dodge, 58 Minn. 555; Elliott, Roads & S. 331, 635. The improvement which the commissioners are authorized to make need not be for the use of all kinds of vehicles or of any certain number of them. Limitation of sidewalks to footmen is valid. Parkways may be constructed for designated vehicles. Elliott, Roads & S. 2, 7, 12, 301–305, 636, note; Boston v. City, 140 Mass. 87; Mercer v. Corbin, 117 Ind. 450; City of St. Paul v. Smith, 27 Minn. 364; G. S. 1894, §§ 1913, 6780, 7784, 7817. The public easement is not limited to any particular method of travel, but improved methods may be used. Holland v. Bartch, 120 Ind. 46; Cater v. N. W. Telephone Ex. Co., supra; Thompson v. Dodge, supra; Magee v. Overshiner, 150 Ind. 127; Carli v. Stillwater St. Ry. & T. Co., supra. The power of the legislature extends to regulation of the use of highways by omnibuses, street cars, bicycles, hacks, etc., and is usually conferred on local authority. State v. Yopp, 97 N. C. 477; State v. Collins, supra; Matter of Wright, 29 Hun, 357; Alberger v. Mayor, 64 Md. 1; Mercer v. Corbin, supra; Elliott, Roads & S. 327, 331, 614, 635; 2 Dillon, Mun. Corp. § 656; Knobloch v. Chicago, M. & St. P. Ry. Co., 31 Minn. 402; Bohen v. City of Waseca, 32 Minn. 176; Newell v. Minneapolis, L. & M. Ry. Co., 35 Minn. 112.

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CANTY, J.

Laws 1899, c. 43, § 1, reads as follows:

"Any person who wilfully injures, obstructs or destroys or drives any cattle, sheep, horse, swine or other animals, team or vehicle, except a bicycle, or wilfully allows his cattle, sheep, horse, swine or other animal to be led or driven upon, or to stray along a bicycle path constructed exclusively for the use of bicyclists, except for the purpose of crossing such paths at street intersections, and at private driveways leading from the street to adjoining premises, and for the purpose of crossing such paths to and from the street and adjoining premises where necessary, shall be guilty of a misdemeanor, and on conviction thereof, be fined not less than five (5) dollars or more than fifty (50) dollars, or by imprisonment for not more than thirty (30) days, or both."

Under this section an indictment was found against the defendant by the grand jury of Hennepin county, the charging part of which indictment reads as follows:

"The said Alfred Bradford, on the 31st day of March, A. D. 1899, at the village of St. Louis Park, in said Hennepin county, then and there being, did wilfully, unlawfully, wrongfully, knowingly, and feloniously drive a team of horses attached to a sled, commonly so called, upon, over, and along that certain bicycle path constructed exclusively for the use of bicycles, said bicycle path being then and there commonly known, designated, and described as the Lake street boulevard bicycle path, which said bicycle path runs from the city of Minneapolis to Lake Minnetonka, in said county of Hennepin, at a point and place upon said bicycle path where said bicycle path runs along the northern boundary of section seventeen, in township one hundred seventeen, and range twenty-one west, in said county of Hennepin and state of Minnesota, said point and place upon said bicycle path not being a street intersection nor a private driveway leading from the street to the adjoining premises, and it not being then and there necessary for the said Alfred Bradford to drive said team of horses and sled upon, over, and along said bicycle path, at said point and place, for the purpose of crossing said bicycle path to or from the street and adjoining premises, contrary to the statute," etc.

The defendant was convicted, and appeals from an order denying a new trial.

1. It will be observed that said section 1 consists wholly of one sentence, and appellant contends that the first clause in the sentence ending with the words "except a bicycle" is wholly discon-

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nected from what follows, does not make sense, or express anything, and that, therefore, this section does not make the driving of "a team or vehicle" upon such a path a crime. We cannot so hold. While the section is not very well worded, it means that "any person who wilfully * * * drives any * * * team or vehicle except a bicycle * * * upon or * * * along a bicycle path * * * shall be guilty of a misdemeanor."

2. But the section is not expressly confined in its operation to cases of public bicycle paths, or bicycle paths constructed in public streets or highways, and bicycle paths constructed on private grounds for the use of the public, or to any of them; and according to the strict letter of the statute a person would be liable for injuring, destroying, or driving upon a private bicycle path constructed by himself upon his own land. Clearly, the legislature never intended to give the section so broad an effect, and the act must be cut down by construction so that it will apply only to cases of public bicycle paths. In our opinion, it is the duty of the court so to cut down the section by construction, and, as so construed, it is valid.

3. It appears by the evidence in this case that the bicycle path here in question was constructed by the county commissioners of Hennepin county in the summer of 1898, extends from Lake street, in Minneapolis, westward towards Lake Minnetonka, a distance of 12 miles, and was built on the south side of the traveled roadway, and within the boundaries of the public highway, in that county. The path is about eight feet wide, is separated from the ordinary traveled roadway by a shallow ditch, and the evidence shows that when the county commissioners were constructing the path they intended it for the exclusive use of bicyclists, and the manner of its construction and the use to which it has been put tend to show that it was intended for their exclusive use. But appellant contends that the board of county commissioners had no power to set apart a portion of the public highway for the exclusive use of bicyclists. Whether the county commissioners had such power prior to the passage of said chapter 43 we will not consider. That act was approved March 6, 1899, and, in our opinion, section 1 by implication ratified the act of the county commissioners in setting apart, or

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attempting to set apart, a portion of the public highway for the exclusive use of bicyclists. The section also by implication authorized the county commissioners thereafter to set apart a portion of a public highway for such exclusive use.

4. But, in our opinion, the indictment is fatally defective because it does not allege that the bicycle path was constructed in, or is a part of, a public highway situated and being in Hennepin county. It is not alleged that the bicycle path is a public path, and for all that appears by the indictment the path might have been the private property of defendant, and a part of his own land. Where the statute does not sufficiently define the crime, or set forth all the elements necessary to constitute the offense intended to be punished, an indictment is not sufficient which merely follows the language of the statute. State v. Howard, 66 Minn. 309, 68 N. W. 1096; State v. Abrisch, 41 Minn. 41, 42 N. W. 543.

The order appealed from is reversed, and the case remanded, with directions to the court below to dismiss the action, and either submit the case to another grand jury, or discharge the defendant, as that court shall deem proper.

BROWN, J.

I concur in the result, but withhold my assent to the proposition that Laws 1899, c. 43, is a valid law, and to the proposition, in effect, that the law should be "cut down by construction" to make it valid. The law confers no power upon the board of county commissioners to locate or establish a bicycle path, but proceeds on the theory that such a path is already known and has a legal existence, and I object to judicially reading into the body of the law a provision giving the county commissioners such authority. The legislature of this state has never seen fit to provide for or authorize the location of bicycle paths, and, in my judgment, until such authority is given to the proper municipal authorities, or until expressly provided for in some other way, such paths can have no legal existence. The serious objection to this law is that it makes it a criminal offense for a person to trespass upon that which is not known to the law. What is a bicycle path? And when may it be said that one has been lawfully established and laid out, so as to be entitled to the protection of this law? What officer or tribu-

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nal has authority to act in that behalf? The opinion of the majority members of this court confers such authority upon the board of county commissioners, but the law itself does not so read, or contain a suggestion or inference of the kind.

L. J. RICE v. LONGFELLOW BROS. COMPANY.

78 394
82 154

December 19, 1899.

Nos. 11,765—(139).

Contract—Agency.

The correspondence between the parties referred to in the opinion considered, and *held*, that it establishes a contract of agency whereby the plaintiff was to buy for and ship to the defendant certain fruit on its sole account.

Amending Answer.

The trial court erred in denying the defendant's application to amend its answer.

Action in the district court for Hennepin county to recover $1,410 with interest on account of moneys advanced as agent, and commissions. The case was tried before McGee, J., who directed a verdict in favor of plaintiff for $1,436.35, and from an order denying a motion for a new trial, defendant appealed. Reversed.

Fred W. Reed, for appellant.

Noyes & Prendergast, for respondent.

START, C. J.

The allegations of the complaint, so far as here material, are to the effect that the defendant employed the plaintiff to purchase in Arizona for and to ship to it at Minneapolis certain fruit; that the plaintiff accepted the agency, and by direction of the defendant purchased and shipped to it two car loads of pears, for which he paid $600, and for the freight thereon $600 more, and for icing the refrigerator cars in which the pears were shipped the further sum of $180, or, in all, $1,380, which sum, with compensation for his services, he claimed to recover in this action.

The answer denied the allegations of the complaint, and set up

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as a counterclaim that in reliance upon the representations of the plaintiff as to the character and quality of the pears, the manner of packing them, and the cost of shipping them, the defendant made a contract with him whereby he was to buy three car loads of pears upon the joint account of the parties, and to ship them to the defendant, to be sold by it in Minneapolis, and the profits and losses of the venture to be divided equally between them; that the pears were not of the kind and quality or packed as represented, in that one-third to one-half of them were gnarled and scarred, and not in a good merchantable condition, and that they were not properly packed; that such condition of the fruit was caused by the wrongful, unauthorized, and negligent conduct of the plaintiff, whereby the defendant sustained damages in the sum of $367.50. The reply denied the allegations of new matter in the answer.

On the trial the plaintiff gave evidence establishing prima facie his cause of action. The defendant then offered evidence tending to establish its counterclaim. The trial court excluded its evidence on the ground that the contract between the parties was not as alleged in the answer, but was a contract of agency whereby the plaintiff was to buy and ship the pears for the defendant as its agent. Thereupon the defendant asked leave to amend its answer to meet the court's interpretation of the contract by admitting that it was a contract of agency, and alleging a breach thereof, in that the plaintiff negligently performed the contract, and not in accordance with his instructions, whereby the defendant was damaged. The trial court denied the motion to amend, and directed a verdict for the plaintiff for $1,380 and interest. The defendant appealed from an order denying its motion for a new trial.

The first question to be considered is whether the trial court's ruling as to the contract was correct. The plaintiff's residence was Phoenix, Arizona, and that of the defendant Minneapolis, where it was engaged as a wholesale dealer in fruit. It was admitted on the trial that the contract was solely evidenced by letters and telegrams passing between the parties, all of which were offered in evidence. This documentary evidence is too voluminous to be here set out in detail. The preliminary correspondence between the parties shows that the defendant desired the plaintiff

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to secure the shipment of fruit to it by the owners thereof, to be sold on commission. The plaintiff replied that fruit growers were accustomed to sell their fruit on the trees, and that it was difficult to get them to consign it, and stated that he had talked with the owner of an orchard containing 1,200 pear trees about making a consignment of his fruit, but that he wanted to sell on the tree for what he could get, and further:

"If, on receipt of this, you wish to buy his fruit, no doubt you could do so at a figure that there would be a large margin in, and, knowing the market, you could wire me any instruction you see fit, which I will make a faithful effort to carry out."

Five days thereafter the plaintiff wrote the defendant that the owner of the pear orchard referred to in his previous letter would not consign his fruit, but that he would sell. The letter gave the price at which the pears could be bought; also an estimate of the expenses of shipping the fruit, including packing, freight, and ice, and added:

"Now, then, you know the market there, and how long it will take to get it there, and if you can see anything in it to buy, I will do everything I can to make it a profitable deal; and, not having any business on my hands to interfere, will look after the work personally, and see that everything is right."

In answer to this letter the defendant wired the plaintiff thus:

"L. J. Rice, Phoenix: Ship quick, joint account, one car Bartlett pears, freight, as sample, packed and wrapped California style. Only green stock. Iced refrigerator. Wire shipment."

The plaintiff answered this by letter, in which, after stating that it was uncertain when he could get a refrigerator car, he said:

"I think I shall know something about the car to-morrow, but don't dare to close for the fruit until I do."

The next day he writes the defendant that he has sent it a sample box of the fruit, and requesting that on the receipt of the sample the defendant wire him whether to go ahead and ship, and added this caution:

"If market is such that there is danger of loss, don't fail to wire

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me. They will cost not far from 3c. laid down in Minneapolis, so we must not ship if market goes down too near that."

The defendant evidently was not pleased with the conservatism of its proposed partner, and in answer to his letter wired him as follows:

"To L. J. Rice, Phoenix, Ariz.: Market always fluctuates. If you don't want to take risk, then name lowest price per box for all Bartletts in orchard mentioned. Say how many cars. Want stock wrapped, packed California style. Smaller pears than sample preferred. Answer quick how soon can ship refrigerator car."

Thereupon the following telegrams were exchanged between the parties:

"Phoenix, Arizona, 16th Aug., '98.
Longfellow Bros., 504 Second Ave. North: One fifty hundred loaded, seventy-five orchard net. Three cars. One starts Saturday. L. J. Rice. 11:45 p. m."

"Minneapolis, Minn., Aug. 17, 1898.
L. J. Rice: Your price would figure 60 cents box of 40 pounds net weight f. o. b. If this is right, go ahead, and load 500 boxes per car. Answer. Longfellow Bros. Co."

"Phoenix, Ariz., Aug. 17, 1898.
To Longfellow Bros.: Yes, sixty cents net to owner f. o. b. First car Saturday. L. J. Rice."

"Minneapolis, Minn., Aug. 19.
L. J. Rice, Phoenix: Route all shipments care Chicago, Milwaukee & St. Paul at Kansas City. Longfellow Brothers."

This correspondence shows that the proposed contract that the parties should buy, ship, and sell on joint account—the contract alleged in the answer—was never completed, and that the contract actually made was, as the trial court found, one of agency, whereby the plaintiff was to buy and ship the pears on the sole account of the defendant. The ruling of the court excluding the defendant's evidence to establish its counterclaim on the grounds stated was, therefore, logically correct.

But it is clear from the pleadings that the complaint and answer referred to the same contract or transaction between the parties, the only difference being that the answer set it out as a contract for the purchase and shipping of the pears on joint account, while the complaint correctly construed it as one of agency for the pur-

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chase of the pears on the sole account of the defendant. The alleged breach of the contract was the same whether the contract be construed as one for the purchase of the pears on the joint account of the parties, or as one of agency for the purchase of the pears on the sole account of the defendant. The only substantial change in the answer asked for was that the defendant be permitted to admit the contract as alleged in the complaint, leaving the allegations as to a breach thereof substantially as they were in the original answer. The proposed amendment was only a formal one, and the trial court, in the exercise of a reasonable discretion, ought to have allowed it. It was error not to do so.

Order reversed, and a new trial granted.

CHARLES E. BOWERS v. MISSISSIPPI & RUM RIVER BOOM COMPANY.

December 19, 1899.

Nos. 11,819—(158).

Injury to Abutting Owner—Prospective Damages.

The test whether an injury to real estate by the wrongful act of another is permanent, in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.

Continuing Nuisance—Former Judgment not a Bar.

The defendant, in the year 1887, placed in the river opposite the plaintiff's farm, but not upon it, certain piling, to facilitate the floating of logs in the stream, and has ever since maintained it there. The effect of the piling was and still is to turn the water, logs, and ice upon plaintiff's land, whereby its shores were and are washed away. In the year 1895 he recovered a judgment for the injuries to his land by reason of the acts of the defendant to that date, which was satisfied. In the year 1899 he brought this action to recover the damages to his land so accruing since the commencement of the former action. *Held*, that as to the plaintiff such piling is a continuing nuisance, for which successive suits for damages may be brought, and that the former judgment was not a bar to this action.

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Action in the district court for Anoka county to recover $1,000 damages for injuries to plaintiff's land, caused by placing piling in the Mississippi river, whereby water was caused to flow over the land. The case was tried before McGee, acting judge, who directed a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

Everett Hammons, for appellant.

The former judgment is not a bar. When the continuance of an act is necessarily injurious and of a permanent character, but the act may or may not be continued, or may or may not be injurious, the injury to be compensated for is only the damage that has already happened. Town v. Cheshire, 23 N. H. 83; Adams v. Goodrich, 55 Ga. 233; Ohio v. Wachter, 123 Ill. 440. When the extent of a wrong may be apportioned from time to time, and it does not go to the entire destruction of the estate or its beneficial use, separate actions not only may, but must, be brought, to recover the damages sustained. Plumer v. Harper, 3 N. H. 88; Bare v. Hoffman, 79 Pa. St. 71; Hargreaves v. Kimberly, 26 W. Va. 787. To be permanent, the injury must have wholly accrued at the time of the wrongful act. An injury is continuing, if it can and should be terminated, and such injury is to be compensated for on the theory that it will be terminated. Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212; Baldwin v. Chicago, M. & St. P. Ry. Co., 35 Minn. 354; Jungblum v. Minneapolis, N. U. & S. W. R. Co., 70 Minn. 153, 160; McCullough v. St. Paul, M. & M. Ry. Co., 52 Minn. 12; Adams v. Hastings & D. R. Co., 18 Minn. 236 (260); Valley v. Franz, 43 Oh. St. 623; Uline v. New York, 101 N. Y. 98; Chicago v. Loeb, 118 Ill. 203; Grady v. Wolsner, 46 Ala. 381; Chicago v. Schaffer, 124 Ill. 112; Hazeltine v. Case, 46 Wis. 391; Omaha v. Standen, 22 Neb. 343; Bizer v. Ottumwa, 70 Iowa, 145; National v. Minnesota, 57 Mich. 83; Russell v. Brown, 63 Me. 203; McCoy v. Danley, 20 Pa. St. 85; Cleveland v. Pattison, 67 Ill. App. 351; Hahn v. Miller, 68 Iowa, 745; Howard v. Kimball, 65 Me. 308; Redfield, Greenleaf Ev. 563.

J. B. Atwater, for respondent.

The former judgment was a bar. The injury was perma-

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nent. Fowle v. New Haven, 107 Mass. 352, 112 Mass. 334, 337; Ohio v. Wachter, 123 Ill. 440; Hargreaves v. Kimberly, 26 W. Va. 787; Chicago v. Loeb, 118 Ill. 203; Town v. Cheshire, 23 N. H. 83; Bizer v. Ottumwa, 70 Iowa, 145; National v. Minnesota, 57 Mich. 83; City v. Voegler, 103 Ind. 314; Adams v. Hastings & D. R. Co., 18 Minn. 236 (260); Omaha v. Standen, 82 Neb. 343; 8 Am. & Eng. Enc. (2d Ed.) 678–687; Mayne, Dam. 138, 611; 1 Sutherland, Dam. §§ 175–197, 403; 1 Freeman, Judg. § 41; Nelson v. Village of West Duluth, 55 Minn. 497.

The law authorized respondent to place this piling in the Mississippi river, and that which the law authorized cannot be a nuisance. Patterson v. City of Duluth, 21 Minn. 493; Miller v. Mayor of New York, 109 U. S. 385; Pound v. Turck, 95 U. S. 459; Transportation Co. v. Chicago, 99 U. S. 635. The piling was placed in the river and not on plaintiff's land, and was in the first instance lawful. Conceding, for the purpose of the argument, that it subsequently caused injuries to plaintiff amounting to a "taking" of his land, still the structure would be lawful as to all the world and would be unlawful as to plaintiff only in case defendant did not pay to him the legal compensation for his injuries. An equitable suit to abate the piling would be stayed to allow the settlement of the damages by a condemnation proceeding. Weaver v. Mississippi & R. R. Boom Co., 30 Minn. 477. Plaintiff's compensation might be ascertained either by act of the parties, or by condemnation proceedings or by a suit for damages. Nelson v. Village of West Duluth, supra; Chicago v. Loeb, supra.

Where a public or quasi-public corporation, acting under legislative authority, has erected in a navigable stream a structure proper for its purposes, the necessary effect of which is to cause a taking of plaintiff's land, then plaintiff has but one cause of action to recover all his damages, present and prospective, and cannot bring successive actions as in the case of continuing nuisance. In the application of this principle to the case at bar defendant contends: 1. That this case shows simply one wrongful act or completed injury; that when this injury concurred with damage to plaintiff, and he saw fit to bring an action of trespass instead of forcing a condemnation, he could, and in law should, have col-

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lected all his damages, both past and future, therefor; that his cause of action having once accrued and been exhausted, no new cause of action can have arisen. National v. Minnesota, supra; Bizer v. Ottumwa, supra; City v. Voegler, supra. 2. That this piling being constructed under legislative authority, was not a nuisance even though it caused damage to plaintiff. Romer v. St. Paul City Ry. Co., 75 Minn. 211; City v. Flood, 57 Neb. 124; Poole v. Falls, 88 Md. 533; Patterson v. City of Duluth, supra.

START, C. J.[1]

This is an action to recover damages which the plaintiff claims to have sustained by the act of the defendant in placing piling in the Mississippi river opposite his farm, whereby the water in the river was turned from its natural course, and carried upon and against his land, washing away the shores thereof. The answer admitted and alleged that in the year 1887 the defendant, in the exercise of its charter powers as a corporation engaged in the business of booming and driving logs, placed the piling in the river for the purpose of keeping floating logs off from the sand bars therein, but that the defendant removed the piling in 1895. It further alleged that on May 4, 1895, the plaintiff duly recovered judgment against the defendant for the same cause of action alleged in the complaint in this action, and that such judgment has been paid and satisfied. The reply denied that the judgment pleaded as a bar was for the same cause of action as that alleged in the complaint herein. The trial court, at the close of the evidence, directed a verdict for the defendant, on the ground that the judgment in the prior action was a bar to this one, and, further, that the evidence was not sufficient to establish a cause of action against the defendant. The plaintiff appealed from an order denying his motion for a new trial.

If the former judgment is not a bar, the evidence, although conflicting, was sufficient to sustain a verdict for the plaintiff. The question, then, for our consideration, is whether the trial court erred in holding that the prior judgment was a bar to this action.

There was evidence, as to this question, tending to establish

[1] BROWN, J., took no part.

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these facts: The defendant, in the year 1887, placed the piling in the river, and has ever since kept it there. The effect of this piling was and still is to turn the water, ice, and logs against plaintiff's land, whereby its shores were and are cut and washed away. The plaintiff, on February 5, 1895, brought an action against the defendant to recover the damages sustained by him by reason of such acts of the defendant, and recovered a judgment therefor in the sum of $400, which is the prior judgment in question. It has been satisfied. In the prior action prospective damages were not claimed nor assessed. It was established in that action, as the jury found, that four and one-half acres of the plaintiff's land had been washed away by reason of the defendant's wrongful acts prior to the commencement of this action, and the court instructed the jury that the measure of damages was "the difference between the actual value of the land as it was before the washing and as it now is with the washing away." Since February 5, 1895, some four acres more of the plaintiff's land have been washed away by reason of such piling being so maintained in the river, and this action is for the recovery of damages therefor.

The plaintiff was bound to recover in his first action all the damages to which he was entitled; and if he was then entitled to recover for all injuries, past, present, and future, to his land, by reason of the acts of the defendant in placing and maintaining the piling in the river, the judgment in the prior action is a bar to this one; for the plaintiff, if such were the case, could not split up his cause of action, and recover a part of his damages in the first action, and then bring this action for the rest of them. The defendant claims that the first action was just such a case, and that the trial court correctly held the judgment to be a bar.

The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act. 8 Am. & Eng. Enc. 687; Uline v. New York, 101 N. Y. 98, 4 N. E. 536; Valley v. Franz, 43 Oh. St. 623, 4

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N. E. 88; Wells v. New Haven, 151 Mass. 46, 50, 23 N. E. 724. This last case refers to Fowle v. New Haven, 107 Mass. 352, relied upon by the defendant in this case, and indirectly disapproves it. The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury. But, where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting.

Fortunately, we are relieved from any uncertainty as to the application of the rule to the facts of this case by the decisions of this court; for they conclusively establish the proposition that the acts of the defendant, in placing and maintaining the piling in the river, whereby the water, logs, and ice were driven upon the shore of the plaintiff's land, were in the nature of a continuing trespass or nuisance, and that successive actions may be brought for the damages as they accrue. Harrington v. St. Paul & S. C. R. Co., 17 Minn. 188 (215); Adams v. Hastings & D. R. Co., 18 Minn. 236 (260); Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41, 11 N. W. 124; Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212, 36 N. W. 339; Adams v. Chicago, B. & N. R. Co., 39 Minn. 286, 39 N. W. 629; Lamm v. Chicago, St. P., M. & O. Ry. Co., 45 Minn. 71, 47 N. W. 455. The facts in these cases, except that of Byrne v. Minneapolis & St. L. Ry. Co., are similar. In each case the railway company built and maintained its roadbed, upon which to operate its cars, in a public street or highway, upon which the plaintiff's land abutted, and it was held that the acts of the defendant were a continuing trespass or nuisance, for which successive actions could be brought. The question is tersely and clearly discussed, and directly decided, in the last case cited. The satisfaction of the judgment in the first action brought by the plaintiff to recover the damages already accrued was not a purchase of the right to continue the trespass or nuisance, for it was not the equivalent of a judgment in condemnation proceedings. Lamm v. Chicago, St. P., M. & O. Ry. Co., supra.

The defendant seeks to distinguish its case from the cases in this

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court which we have cited, on the ground that it was authorized by law to place and maintain the piling in the river to facilitate the floating and driving of logs therein, and that no part of the piling was on the land of the plaintiff, and no negligence in the premises on its part is claimed. All these facts may be conceded, and still the act of the defendant in maintaining the piling be a continuing nuisance as to the plaintiff. The obstruction was lawful as to the public, but the legislature could not authorize the defendant to maintain it as against a private party whom it injured. Hueston v. Mississippi & R. R. Boom Co., 76 Minn. 251, 79 N. W. 92. The fact that the obstruction did not physically touch the plaintiff's land is immaterial; for while the trespass or injury is not direct, but indirect, the plaintiff's damages are just as great as if some part of the obstruction rested on his land.

In the case of Byrne v. Minneapolis & St. L. Ry. Co., supra, the cause of the injury to the plaintiff's land was the construction and maintenance of the defendant's roadbed, no part of which was on the plaintiff's land, so as to obstruct a natural water course. This was held to be a continuing nuisance, for which successive actions could be maintained. See also Jungblum v. Minneapolis, N. U. & S. W. R. Co., 70 Minn. 160, 72 N. W. 971. In the case of Adams v. Chicago, B. & N. R. Co., supra, the defendant, by virtue of an ordinance of the city of Winona, lawfully constructed and operated its railway, without negligence, in and along a public street of the city upon which the plaintiff's land fronted, no part of which was physically touched by the railway, but it was injured thereby, and it was held that the measure of damages was the depreciation of the rental value of the land to the commencement of the action.

The act of the defendant in the case at bar in placing and maintaining the piling in the river was, whatever it may have been as to the public, as to the plaintiff a continuing trespass or nuisance, and he was entitled to bring successive actions to recover his damages as they accrued. It follows that the trial court erred in holding the former judgment a bar.

Order reversed, and new trial granted.

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JOHN M. GLEASON v. GEORGE F. WARNER.

December 19, 1899.

Nos. 11,897—(151).

Burial of Dead—Husband and Wife.

It is the right and the duty of the husband to bury his deceased wife in a suitable manner. His wishes in the premises must be respected, and no gratuitous intermeddling therewith by third parties will be encouraged. But, if he neglects to discharge the duty of burying his dead wife, he is liable to one who provides for her necessary and reasonable burial.

Finding Sustained by Evidence.

Evidence considered, and *held* that it sustains the finding and conclusion of the trial court to the effect that the defendant was notified of the death of his wife, and that he failed to provide for her burial; that, the plaintiff having done so at the request of a relative of the wife, the defendant is liable therefor.

Action in the municipal court of Minneapolis to recover $296 and interest for materials and labor furnished and performed by plaintiff as undertaker for the burial of defendant's deceased wife. The case was tried before Holt, J., who found in favor of plaintiff in the sum of $256.50; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Robert Christensen, for appellant.

William H. Donahue, for respondent.

START, C. J.

The material facts in this case, as found by the trial court, are these: On and prior to August 8, 1898, the defendant and Callie Helen Warner were husband and wife, and on that day she commenced an action against him for a divorce in the district court of the county of Hennepin. Such proceedings were had therein that the court made an order restraining the defendant from in any manner interfering with his wife during the pendency of the action. Thereupon the wife, who was then ill, was, at her request, removed to St. Mary's Hospital, in the city of Minneapolis, for care and treatment, where she died, on the morning of September 2, 1898.

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The plaintiff, who is an undertaker, at the request of the niece of the wife and her physician, removed her corpse to his undertaking establishment. The defendant, while the corpse of his wife was so in charge of the plaintiff, was notified of her death, and where her corpse was; but he made no attempt to remove the body or prepare it for burial, except that he gave to his wife's attorney $100 to pay the amount due to the hospital for her care and treatment, and for shipping her remains to Natchez, Mississippi, her former home, for interment there. On the afternoon of the wife's death, the plaintiff embalmed the body, and placed it in a casket furnished by him and selected by the niece of the wife, and at six o'clock of the same evening placed it on the car for shipment to the proposed place of burial. The casket and materials so furnished by the plaintiff and his services were of the reasonable value of $246.50, and were such as were proper and reasonable for the station in life of the deceased. As a conclusion of law, the court ordered judgment for the plaintiff. The defendant appealed from an order denying his motion for a new trial.

It is the right and the duty of the husband to bury his deceased wife in a suitable manner. His wishes in the premises must be respected, and no gratuitous intermeddling therewith by third parties will be encouraged. But, if the husband neglects to discharge the duty of burying his dead wife, he is liable to one who provides for her necessary and reasonable burial. Schouler, Dom. Rel. § 199. This liability is similar to the obligation of the husband to supply his wife with necessaries in life; for when dead the necessity for the speedy burial of her body is pressing and imperative, brooking no delay. Hence, if the husband is absent and cannot, or if present and will not, discharge this duty, the law implies a request on his part to do so to whoever reasonably performs the duty for him. It therefore follows that if the finding of the trial court to the effect that the defendant was seasonably notified of the death of his wife, and that he neglected to take any steps to prepare her body for burial, is sustained by the evidence, the defendant is liable to the plaintiff for the reasonable value of the casket and his services as an undertaker.

It was stipulated on the trial that $246.50 was a reasonable

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charge for the services and materials furnished by plaintiff, if he is entitled to recover at all. But counsel for the defendant vigorously insists that the finding in question is not sustained by the evidence, but, on the contrary, that it appears that the defendant had no notice of his wife's death until the evening her body was shipped from the state.

This is not, as claimed, a case where the reasonable wishes and efforts of the husband to give his dead wife a burial, becoming his and her station in life and his financial circumstances, have been thwarted by the officious intermeddling of his wife's relations, aided by the plaintiff. The plaintiff simply acted in good faith upon the request of the attorney and niece of the wife, in the absence of any action on the part of her husband. If defendant was seasonably notified of the death of his wife, it was his duty to take prompt action to secure the decent and reasonable burial of her remains. His attorney claims for him that he did not have such notice. This is the pivotal point in this case; for, unless he knew or ought to have known that his wife was dead, he cannot be charged with any neglect of duty in the premises. It is a significant fact, however, in this case, that the defendant did not appear in court as a witness, and deny that he did not have seasonable notice and knowledge of his wife's death. His absence was not explained. The direct evidence in support of the finding of the trial court is meager, but the circumstantial and negative evidence tending to support the finding is cogent, and, upon the whole record, we hold that the finding in question is fairly supported by the evidence. The remaining assignments of error are technical, and without substantial merit.

Order affirmed.

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JOSEPH M. DAVIS and Others v. SWEDISH-AMERICAN NATIONAL BANK and Others.

Nos. 11,918—(211).

On Motion to Dismiss Appeals.

November 28, 1899.

Notice of Appeal—Parties to Appeal.

An assignee in insolvency filed his final account, and applied, on proper notice, to have the same allowed. There were 41 creditors who had filed claims, but only 3 of these appeared on the hearing. These 3 opposed the claim for compensation for the assignee and his attorneys, the claim was disallowed, and the assignee appealed, and served the notice of appeal on said 3 creditors only. On motion to dismiss the appeal for failure to serve on the other creditors, *held*, the service is sufficient, and the motion is denied.

Attorney—Right of Appeal.

The attorneys appealed, also. *Held*, they were not parties to the proceeding in the court below, have no independent right of appeal, and their appeal is dismissed.

On Appeal.

December 19, 1899.

Account of Assignee.

This is an appeal from certain orders of the district court settling the account of the appellant as assignee in insolvency, in which it is *held*:

Fraud—Finding.

The finding of the trial court to the effect that the assignee and his attorneys in the management of the trust estate were guilty of actual fraud, gross misconduct, and bad faith is sustained by the evidence.

Compensation of Assignee.

If a trustee has been guilty of fraud, wilful default, or gross negligence in the management of the trust estate, compensation for his services will be denied to him. This rule is not abrogated by Laws 1895, c. 66, § 6, relating to fees of assignees and their attorneys in insolvency proceedings.

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Compensation of Attorney.

If an attorney is guilty of fraud or bad faith as to his client in the matter of his employment, he is not entitled to any pay for his services.

Use of Trust Fund—Finding Sustained by Evidence.

The finding of the trial court that the assignee used the trust fund in his own business is sustained by the evidence. The general rule is that if a trustee mingles the trust fund with his own money, or uses it in his own business, he will be charged with simple interest on the fund at the legal rate, but if he receives or makes more than that he must account for it; following St. Paul Trust Co. v. Kittson, 62 Minn. 408, and distinguishing and limiting In re Shotwell, 49 Minn. 170.

Costs and Disbursements—Lien of Attorney.

A judgment for costs and disbursements is the property of the party recovering it, and not of his attorney,—subject, however, to the lien of the latter for his services.

Interest.

The trial court did not err in disallowing the claim of the assignee for fees for himself and his attorneys, nor in charging him with interest on the trust fund and the amount of a judgment collected by his attorneys.

In the matter of the assignment of Jacob Skoll, insolvent, pending in the district court for Hennepin county, Joseph M. Davis, the assignee, made application for allowance of his final account and to have the compensation of himself and of his attorney fixed. The Swedish-American National Bank interposed objections. The court, Elliott, Simpson, Johnson, McGee, Lancaster, and Harrison, JJ., made an order disallowing the claim for compensation and charging the assignee with certain items. Thereafter the court, Simpson, McGee, Harrison, and Elliott, JJ., made an order denying the application of the assignee to have the previous order modified, except as to one item of the account (Elliott, J., dissenting in so far only as the order adjudged the assignee guilty of actual fraud). From both orders, the assignee and Ambrose N. Merrick and others, his attorneys, appealed. Affirmed as to the assignee.

In the supreme court a motion was made to dismiss the appeals. Denied as to appeal of the assignee. Granted as to the appeal of Merrick and others.

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Simon Meyers and *Wm. H. Donahue*, for appellant Davis.
M. H. Boutelle, for appellants Merrick and others.
A. Ueland, for respondents.

Upon the motion to dismiss the appeals, the following opinion was filed November 28, 1899:

CANTY, J.

1. Skoll made an assignment for the benefit of his creditors under the insolvency law of 1881. The appellant Davis is the assignee. He filed his final account, and on the hearing of the same the court refused to allow him compensation for his services, or for the services of his attorneys, and he appeals from the order disallowing all of the same.

Three of the creditors of Skoll appeared at said hearing, objected to the allowance of any such compensation, and opposed such allowance. The notice of appeal was served on those three creditors, but not on any of the other creditors. There were in all 41 creditors who had filed claims, but none of them, except said three, appeared at said hearing or opposed such allowance. Said three creditors now move this court to dismiss the appeal because the notice of appeal was not served on the other creditors, of whom sixteen are not residents of this state; but the claims of five of these have been assigned to a resident of this state, and the claims of six of the others were filed through attorneys residing in this state.

In our opinion, every one of the creditors who did not appear at the hearing has a direct interest in having the order of the court below sustained; and we cannot hold that, as appellant contends, those other creditors are not adversary parties. But it does not follow from this that all of the creditors who filed claims must be served with notice of the appeal.

As a general rule, the great majority of the creditors who file claims in such a proceeding do not desire to be put to the trouble, annoyance, and expense of taking part in the various contests which may arise in the course of the administration of the insolvent estate, or to be mulcted with the costs which might be taxed against them on account of the unsuccessful efforts of the other creditors in such

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contests, and for these reasons remain passive, allowing their claims so filed to abide the event of the contests which the other creditors conduct on behalf of all of the creditors. Of course, if the creditors who so conduct the contest are successful, they are, as a general rule, entitled to be reimbursed for their reasonable expenses out of the common fund so saved or recovered. But, if the creditors who would thus remain passive must be served with notice of appeal, they are liable for the costs of the appeal if unsuccessful, and, when served, cannot safely permit their rights on the appeal to go by default, but must employ counsel, prepare and print briefs, and take part in the argument.

The creditors who file claims in such a proceeding are generally quite numerous, and it is often impracticable to serve notice of appeal on all of them who have filed their claims, and have thereby become parties to the proceeding. These claims are usually filed in the most informal manner, and without notice to any one interested, except the assignee. A large portion of them are, as a general rule, sent in by mail by nonresident creditors or attorneys; and there is no one in the state, representing such creditors, on whom notice of appeal could be served. Usually the claims are being filed from day to day during the whole, or nearly the whole, of the time during which the estate is being administered. When the court by its order limits the time within which to file releases, and that time has expired, it is usually the case that a number of the creditors who filed claims fail to file releases, and are barred from participating in the estate. Again, it often happens that some of these creditors are afterwards permitted to file releases and participate. Under these circumstances, it would often be difficult to determine on whom to serve the notice of appeal. If the appellant failed to serve on all, he would fail in his appeal; and, if he served on some on whom he should not serve, he would be liable to pay them the costs of the dismissal of the appeal as to them. Then, it is often difficult, and even impracticable, to determine on whom notice of appeal should be served, if it must be served on all of the creditors who have filed claims, and who may be entitled to participate in the distribution of the assets. The proceeding is not one which is conducted either according to the common law or equity practice.

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There are no regular pleadings, and the names of the parties are not formally stated in the title, or in any other part of the record.

We are of the opinion that, under all of these circumstances, it is a case for the application of the doctrine that where the persons or parties are numerous, have a common interest, and it is difficult to ascertain them definitely, the action or proceeding may be brought by a few on behalf of all, or against a few so situated that they may represent all. Story, in discussing the exceptions to the rule that all the parties in interest should be made parties to a bill in equity, says:

"The most usual cases arranging themselves under this head of exceptions are, (1) where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole; * * * (3) where the parties are very numerous, and although they have, or may have, separate, distinct interests; yet it is impracticable to bring them all before the court." Story, Eq. Pl. § 97. See also sections 96, 98, 99, 103, 104, 116, 120.

We must presume that all of the 41 creditors who filed their claims had notice of the hearing in the court below. Only three of these creditors appeared and opposed the application of the assignee, and it must be held that by failing to appear the other creditors impliedly consented that those who did appear and oppose the application might do so on behalf of all. Under these circumstances, it was sufficient to serve the notice of appeal on those who did so appear and oppose the application.

The result arrived at is not in conflict with Lambert v. Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834. In that case the insolvents made an application to the court, under Laws 1895, c. 67, for a discharge from the debts of their various creditors who had filed claims in the assignment proceeding. There were a number of these creditors who resided in the state, and on whom the notice of hearing was served, but they failed to appear at the hearing. The court denied the application as to them also, and the insolvents appealed, but failed to serve the notice of appeal on these creditors. This court rightfully held that, as to them, the order appealed from could not be reviewed. Their interests were wholly separate and distinct from those of the other creditors on whom the

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notice of appeal was served, and the latter creditors did not represent the former. In that case the creditors were not so exceedingly numerous, and the difficulties of serving the notice of appeal on them so very great, that the third rule quoted above from Story should be applied.

The motion to dismiss the appeal is denied.

2. The attorneys for the assignee also appeal from that part of the order denying their claim for compensation. Said three creditors move to dismiss this appeal on the ground that the attorneys were not parties to the proceeding in the district court, and are not entitled to prosecute such an appeal. In our opinion, the point is well taken. The attorneys were merely the servants of the assignee, not parties to the assignment proceeding, and whatever compensation is awarded for them should be allowed to the assignee for them. Stuart v. Boulware, 133 U. S. 78, 10 Sup. 242; Appeal of Pereyra, 126 Pa. St. 220, 17 Atl. 602. Of course, if the client is insolvent, or acts fraudulently or in bad faith, or, without sufficient reason, refuses to apply for compensation for his attorney, the latter may apply to the court to be allowed to proceed in his own right and in his own name, or the name of his client, for compensation out of the fund in court. And in that case the attorney may appeal, if unsuccessful. But this is not such a case.

It is ordered that the appeal of Merrick & Merrick be dismissed.

The appeal of the assignee having been argued and submitted, the following opinion was filed December 19, 1899:

START, C. J.

On December 12, 1894, Jacob Skoll made an assignment for the benefit of his creditors, pursuant to the insolvency laws of this state, to Joseph M. Davis. He accepted the trust, and on June 24, 1898, he presented to the district court of the county of Hennepin his final account as such assignee, showing receipts, $7,217.28, disbursements, $1,732.37, and asked its allowance; also, an allowance of $750 for his services as assignee. Attached to the account was a bill of his attorneys for $1,810 fees and $197.75 disbursements, which was also presented for allowance. Testimony was taken August 2, 1898, and the court thereafter, and on November

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29, 1898, filed its order disallowing both assignee's and attorney's fees; charging the assignee with an item of $58.58, costs paid to and collected by his attorneys on an appeal to this court; also, charging him with interest on the funds in his hands from April 12, 1895, until distribution is made.

On December 19, 1898, he filed a petition for a rehearing, and for a modification of this order. The court thereupon made its order for a hearing on the petition on January 7, 1899, and staying proceedings on the first order until such hearing, and a decision thereon. Attached to the petition for a hearing was an account for money claimed to have been actually paid, prior to the making of the first petition, to his attorneys, for fees and disbursements, amounting in the aggregate to $733.40. Such proceedings were had upon the last petition that on September 23, 1899, the court made its order denying the petition, except that the assignee was allowed a credit for $67.50 omitted from his original account. He appealed from both orders.

It is proper here to state that the attorneys representing the assignee on this appeal were not his attorneys at any time prior to the filing of the petition for a rehearing. If we understand the claim of appellants' counsel as to these two orders, it is, in effect, that the second order takes the place of the first one, and that the findings of fact in the former, and the evidence offered on the petition for a rehearing, are alone to be considered on the appeal. Such is not the case, for both orders must be considered as practically one order. The second is in fact just what it purports to be on its face, namely, a modification of the original order as to the item of $67.50. All of the findings of fact in the original order, and the legal conclusions or directions based thereon, remain, except as modified by the second order. The question, then, for our decision, is whether such findings of fact are supported by the evidence; and, if so, are such conclusions correct? This involves a consideration of all of the evidence received on both hearings, and a history of the trust estate, as disclosed by the evidence.

1. The trial court found as a fact that the assignee and his attorneys in the management of the trust estate were guilty of gross misconduct, bad faith, and actual fraud. This finding was not

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modified by the second order, and we are to inquire whether it is supported by the evidence. So far as the finding relates to the assignee, it is earnestly contended that the evidence does not sustain the finding. We have examined the record with the care befitting the gravity of the charge, and have reached the conclusion that the evidence sustains the finding. It is neither practicable nor desirable here to state and analyze in detail the evidence, which is voluminous. We deem it sufficient to refer only to the evidence as to the conduct of the assignee and his attorneys in relation to the claim of Joseph Robitshek against the trust estate. The evidence tends to show these facts:

The First National Bank of Minneapolis had a claim against the insolvent, Skoll, amounting to $17,000, which was secured by a second mortgage on his homestead. The claim was presented to the assignee for allowance, who disallowed it, and the bank appealed to the district court. While the appeal was pending the bank commenced an action to foreclose its mortgage, a decree of foreclosure was had and the mortgaged premises were sold to the bank for $1,000. Before the sale was confirmed, the claim of the bank was sold to Robitshek for $1,800, and the claim was then again presented to the assignee, who allowed it at $17,000. The foreclosure action was dismissed, the mortgage released, and the appeal of the bank from the disallowance of its claim was also dismissed. The negotiations leading to these results were conducted by the insolvent, Skoll, and the attorneys of the assignee. After the allowance of this claim of $17,000 by the assignee, the Swedish-American Bank appealed, as a creditor, therefrom. In the district court, Robitshek appeared by an independent attorney, and filed his complaint, asking the court to allow the claim of $17,000 in his favor, and to adjudge it to be a legal claim against the trust estate. The assignee appeared and answered, by his attorneys, admitting all of the allegations in the complaint, and demanding judgment that his action in allowing the claim be affirmed. The appealing creditor answered, and successfully defended against the allowance of the claim; the trial court finding as a fact that the money paid to the bank for its claim was not the money of Robitshek, but that it was paid for and on behalf of the insolvent, Skoll, to enable him to

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secure a release of his homestead from the mortgage, and to participate in the distribution of the trust estate. Thereupon the assignee united with Robitshek in a motion to set aside the finding of the court and for a new trial. The motion was denied, and the assignee appealed from the order to this court. The order was affirmed. See Robitshek v. Swedish-American Nat. Bank, 68 Minn. 206, 71 N. W. 7.

After the order of the district court disallowing the claim was affirmed in this court, and judgment entered accordingly, Robitshek procured from one of the judges of the district court an order permitting him to present his claim to the assignee, who was directed to act upon it by allowing or disallowing it. A copy of this order, with the claim, was presented to the assignee by one of his attorneys, and he again promptly allowed it. This order and allowance were afterwards set aside by the district court in proceedings taken by creditors. Further attempts were made to secure the allowance of this $17,000 claim against the trust estate, but they were defeated by the vigilance of creditors. An allowance of $350 was made by the order of the district court to such creditors out of the trust estate for the fees of their attorney in successfully opposing the allowance of the Robitshek claim; also, for $69.39 for disbursements incurred in proceedings to obtain the right of creditors to share in the trust estate without releasing their claims. The assignee appealed to this court, and the decision of the district court was affirmed, except as to the $69.39. See Swedish-American Nat. Bank v. Davis, 71 Minn. 508, 74 N. W. 286.

There was other evidence on the trial tending to show other acts of misconduct and bad faith on the part of the assignee and his attorneys in the management of the trust estate. As to the attorneys of the assignee, the evidence, taken as a whole, unquestionably supports the finding in question of the trial court. In considering the evidence as to the assignee, the fact that he was wrongly advised and directed by his attorney must not be lost sight of; but, making due allowance for this fact, and assuming, as we must, that he is a man of ordinary sense, we are of the opinion that the finding is also sustained by the evidence as to him.

2. It is further claimed by counsel for the assignee that the con-

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clusion of the trial court that he was not entitled to any compensation for his services is not justified by its finding of fact as to his conduct and that of his attorneys, for the reason that his right to such compensation is not a matter of judicial discretion, but a vested right, secured by statute (Laws 1895, c. 66, § 6), which provides that the court shall determine specifically and allow the reasonable value of the services performed by the assignee or receiver and his attorney.

The statute aside, the law as to compensation to trustees for their services is well settled. In England the rule is that no compensation will be allowed to trustees for their services in the management of the trust estate, but it is now the general equity rule in the United States that trustees are entitled to reasonable and just compensation for their services. The rule is just and politic, for the best way to secure honest services is to give honest pay. It is equally well settled that if a trustee has been guilty of fraud, wilful default, or gross negligence in the management of the trust estate, compensation for his services, to which he would otherwise be entitled, will, as a general rule, be denied to him. Notes to Gibson's Case, 17 Am. Dec. 266–274; 1 Bland's Ch. 138; 2 Perry, Trusts, § 919; 27 Am. & Eng. Enc. 187. See St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 N. W. 74. This last rule is also wise and wholesome,—especially so when applied to officers of the court, such as assignees and receivers; for its just enforcement has a tendency to secure an honest and faithful discharge of official trusts, and to curb the temptation to abuse them for selfish purposes.

The statute relied on by the assignee in this case must be construed with reference to the equity rule. Now, whether the right of a trustee to compensation rests upon the equity rule, or upon the express provision of the statute, the reason for the rule that an unfaithful trustee will be dismissed empty handed is the same, and the statute will not be construed as abrogating the rule unless an intention to do so is clearly manifest upon its face. Some courts have held that, where a statute specifically fixes the compensation which an assignee or executor or administrator shall receive, he is entitled to the statutory compensation, without reference to his good or bad faith in managing the trust estate. In re Fitzgerald's

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Estate, 57 Wis. 508, 15 N. W. 794. The statute, however, which we are considering, does not attempt to prescribe an inflexible rule as to the compensation of assignees or receivers. Under our insolvency law, the court administers the trust through an assignee or receiver, on equitable principles, except as otherwise expressly provided. The statute and the equity rule are not inconsistent, and we hold that the former does not abrogate the latter. It therefore follows that the trial court did not err in refusing to allow the assignee compensation for his services.

3. The relation of the attorneys of the assignee in this case to the court and to the trust estate was in many respects similar to that of the assignee. It was one of trust and confidence. Their employment as attorneys for the assignee extended to everything connected with the settlement of the trust estate necessary or proper to be done by an attorney. The interest which they undertook to represent was not that of the insolvent or any particular creditor, but the trust estate as represented by the assignee. The contract which the law implied from their employment was that they should render faithful and honest service to the estate. If they have violated this contract, they are not entitled to any compensation for their services; for the rule is that, if an attorney is guilty of actual fraud or bad faith toward his client in the matter of his employment, he is not entitled to any pay for his services. The basis of this rule is good morals and a sound public policy, and it should be enforced in all cases where the fraud of the attorney is established by clear and satisfactory proof. The trial court having found that the attorneys of the assignee were guilty of actual fraud and bad faith in the matter of their employment, it follows that they are not entitled to any compensation for their services out of the trust estate; hence the trial court rightly refused to allow the assignee anything on account of such services, although he had paid his attorneys in part for such services. The assignee claims that, of the $733.40 paid by him to his attorneys, a portion thereof was for legitimate disbursements made by them on account of the estate. The evidence tends to show that $197.75 of the amount paid was for disbursements, but it does not appear from either of the orders made by the trial court that the $197.75 for disbursements

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by the attorneys was not allowed, except as to items of disbursements on account of the litigation concerning the Robitshek claim, which of course were not a legitimate charge against the estate.

4. The trial court found as a fact that the assignee used the funds of the trust estate in his own business, and charged him with interest thereon from April 12, 1895, subject to reduction on account of any legitimate disbursements thereafter made. The finding is supported by the evidence. The assignee, however, claims that the conclusion that he must be charged with interest on the trust fund does not follow from the mere fact that he used it in his own business, and relies in support of his contention on the case of In re Shotwell, 49 Minn. 170, 51 N. W. 909, and 52 N. W. 1078. The decision in the case cited cannot be extended as an authority beyond the particular facts of that case, which may be distinguished from the one at bar by the fact that there was in that case no finding that the trustee used the trust fund in his own business. The facts in that case were that the trustee deposited the trust fund with an unquestionably solvent firm, of which he was a member.

"There was no proof that the assignee or the firm of which he was a member used the money, or made a profit out of it; there was no delay in the payment of dividends, no failure in the performance of a duty, and no breach of trust with respect to the trust funds."

The general rule as to charging trustees with interest was stated by this court, after hearing able and exhaustive arguments, in the case of St. Paul Trust Co. v. Kittson, 62 Minn. 408, 414, 65 N. W. 74, as follows:

"Whatever may be the rule in England, the general rule, which seems to be established in the United States by the great weight of authority, is that, if an executor or trustee mingles the trust fund with his own money, or uses it in his private business, he will be charged with simple interest at the rate established by law as the legal rate, in the absence of special agreements. The rule is subject to the qualification that if he receives or makes more than legal interest he shall pay more. Judd v. Dike, 30 Minn. 380, 15 N. W. 672; 1 Perry, Trusts, § 468; Schouler, Exrs. § 538; 2 Woerner, Admn. § 511; Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 296, and note; 3 Williams, Exrs. (7th Am. Ed.) 363, 365, 404, 407. This rule, while it may work a hardship in special cases, is based upon justice and a sound public policy. In justice, because, as held by

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Chancellor Kent in Mumford v. Murray, 6 Johns. Ch. 1: The trustee who mingles the trust money with his own, and uses it in his own business, must pay interest, for the reason that he uses it as his own. 'It forms, therefore, a very just and clear case for interest.' In a sound policy, because it prevents abuses by taking away all temptation to executors or trustees to use the trust fund in their private business. To relax the rule, as some courts have done, because the trustee acted in good faith, or did not hazard the fund in trade or speculation, would render the rule uncertain, and invite the evils it is intended to prevent."

Such is the settled law of this state. It follows that the assignee in this case was, upon the trial court's finding of fact, properly chargeable with interest. If, as he claims, he has, ever since the making of the court's first finding in this matter, left the entire trust fund on deposit in his name as assignee, it does not affect the correctness of the court's conclusion; for he might have stopped the running of interest by a distribution of the fund, or by applying to the court for an order touching the custody of the fund pending the hearing and final determination of his petition for a rehearing.

5. The last claim of the assignee is that the court erred in charging him with the item of $58.58. This sum was collected by his attorneys on a judgment of this court in favor of the assignee for his costs and disbursements. A judgment for costs and disbursements is the property of the party recovering it, and not of his attorney,—subject, however, to the lien of the latter for his services. 5 Enc. Pl. & Pr. 122. It does not appear from the record that the claim of the assignee against his attorneys for the amount of his judgment is uncollectible; hence it does not appear that the court erred in charging him with the amount thereof.

Orders affirmed.

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FREEMAN P. LANE and Another v. WILLIAM D. HALE.

December 20, 1899.

Nos. 11,836—(134).

Insolvent Estate—Compensation of Attorney of Creditor.

To justify the allowance of compensation in insolvency proceedings out of the trust estate to a creditor who, acting alone and independently of the receiver or assignee, conducts proceedings for the purpose of securing and obtaining for the estate property which might otherwise become lost, it must appear that the services of such creditor in that behalf were not only necessary to the protection of such property, and resulted beneficially to the estate, but that property, or some valuable right or benefit, was thereby secured and preserved which would otherwise have been diverted and lost; that solely by reason of the services and exertions of such creditor such property or valuable right or benefit was saved to the estate.

In the matter of the receivership of the American Savings & Loan Association, pending in the district court for Hennepin county, Freeman P. Lane and Matthew Gallagher applied for an order allowing them $2,500 for services rendered to the shareholders of the association in procuring bidders for its real estate and for services rendered in court. The court, Elliott, J., made an order denying the application, and they made a motion for modification of the order, which was denied. From the order denying the application, as well as from the order denying modification thereof, the applicants appealed. Affirmed.

C. J. Cahaley, Matthew Gallagher and *Freeman P. Lane*, for appellants.

Hay & Van Campen, for respondent.

BROWN, J.

The American Savings & Loan Association, a corporation, became insolvent, and William D. Hale was appointed receiver thereof by the district court of Hennepin county on June 18, 1896. He duly qualified, and has been at all times since, and still is, such receiver. He employed as his attorneys and legal advisers the firm

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of Hay & Van Campen, who appeared for him in all matters and on all occasions when necessary or proper.

On February 3, 1899, said district court made an order authorizing the receiver to advertise for and receive bids for the real estate belonging to the insolvent association, and report the same, if any were received, to the court on March 18, 1899. At the hearing on that day one bid of $85,000 was made. The stock of the association amounted to $1,100,000. The appellants, Lane and Gallagher, representing stockholders owning stock of the value of $1,100, appeared, and opposed the acceptance of the bid, and procured an adjournment of the matter until April 8. The receiver and his attorneys also opposed the acceptance of the bid. There were several subsequent adjournments, which were applied for and requested by appellants, and the matter came on for final hearing on April 21. At this hearing a bid for the property of something more than $38,000 over and above the first bid was offered by the same persons, and accepted by the court. The appellants appeared at all the hearings upon the subject of the sale of the property, and rendered services in procuring other and more favorable bids than the one first offered, but it does not appear that they had anything to do with obtaining the bid finally accepted.

Appellants made application to the court below for an allowance of compensation out of the trust property, claiming that, as their services, though rendered at the instance and request of shareholders or creditors, inured to the benefit of the trust estate, the value thereof was a proper expense in the administration of the trust. The court denied the application, and subsequently denied appellants' motion for a modification of such order. Both orders are appealed from.

To justify the allowance, out of trust funds, of compensation to a creditor who appears and conducts proceedings, independently of the receiver or assignee, for the purpose of obtaining and saving to the trust estate property which might otherwise become lost, it must appear not only that such services were necessary to the protection of such property, and resulted beneficially to the estate, but that property or some valuable benefit was thereby secured or preserved which would not otherwise have been realized or ob-

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tained. It must appear that the property or benefit so about to be lost to the estate was saved thereto solely by the services of such creditors. It is not sufficient that the services were beneficial, or materially aided in preserving the estate. It must further appear and be shown that property or benefits belonging to the estate were secured solely by such services, which would otherwise have been diverted or lost. This may be shown by evidence that the receiver or assignee was neglecting his duties, or for any reason was prevented from instituting timely proceedings to protect the estate.

The contention on the part of the appellants is that they were solely instrumental in preventing the acceptance by the court of the first offer made for the property, and in bringing about the last offer, whereby about $38,000 was realized to the estate over and above the first offer. Unless appellants' contention in this respect can be sustained, they are not entitled to compensation. It is the duty of the assignee or receiver in proceedings of this kind to protect the rights of all interested parties, and it must be assumed, in the absence of some showing to the contrary, that he will do so. By denying appellants' application for allowance of compensation the court below must be taken to have found that there was no failure of duty on the part of the receiver, and that there was no necessity for the interference of appellants. And, to find the contention of appellants to be true, we must necessarily find that it conclusively appears from the record that the court below was in error; that the receiver was neglecting his duties; that his attorneys were neglecting their duties; and, further, that the court below was about to make an order accepting the bid of $85,000 for the property of the trust in the face of the fact that all parties interested—the appellants in behalf of creditors, and the receiver and his attorneys—were protesting against its acceptance; and that, but for the objections and labors of appellants, such order would have been made.

We have examined the record with care and patience, and are unable to reach any such conclusion. The receiver and his attorneys appeared at all hearings before the court, expressly opposed the acceptance of the first bid for the property, and at all times kept the court fully advised as to the condition and value of the estate. There is no suggestion of fraud or collusion between them and any

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of the bidders for the trust property, and we are unable to find any neglect of duty on their part. When the action of the receiver and his attorneys with respect to the acceptance of the first offer for the property was identical with that of appellants, it cannot, in reason, be said that the appellants' objections alone prevented the acceptance of the offer. Indeed, the record will not justify the conclusion that the court below intended to accept it at all. At least it does not conclusively so appear. The natural inference would be, in view of the fact that all interested parties objected thereto, that his honor below would have rejected the bid. At any rate, appellants have failed to show that they were the sole cause of its rejection, or that the higher bid was due solely to their actions.

We agree with counsel for appellants that their clients rendered valuable services in this matter, and ought to receive compensation therefor, but we cannot agree with them that such compensation should come out of the trust estate. As already stated, it is the duty of the assignee or receiver in proceedings of this kind to protect the rights of all interested parties, and to justify the allowance of compensation out of the trust funds to third parties who volunteer their services in that behalf it must be shown by them that the assignee or receiver was neglecting his duties, and that, in consequence of such neglect, such services by them were necessary to protect the estate. Any other rule would work disastrously to trust estates. We cannot open the door to claims of this kind. The rule allowing compensation in such cases as heretofore stated must be followed and applied. Appellants have not brought their case within that rule, and we have no alternative but to affirm the orders appealed from.

Orders affirmed.

CANTY, J. (dissenting).

I cannot concur in the foregoing opinion. Neither can I concur in the proposition that it was necessary for appellants to show that they were the sole cause of the rejection of the first bid, or that the higher bid was due solely to their action. This is equivalent to saying that, no matter how slight and pro forma the assistance of the receiver or his attorney was, and no matter how little he con-

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tributed to the result, if he contributed anything at all, the creditors' attorney, who has borne the brunt of the battle, is entitled to nothing out of the fund which he has been the main cause of saving or recovering.

In order to understand this case, the facts should be stated. The real estate to be disposed of by the receiver was scattered over many states, much of it being in Minnesota, Michigan, Missouri, Nebraska, Kansas, South Dakota, Wisconsin, and Washington. In February, 1899, the receiver appraised all of this real estate at the total sum of $425,780. Shortly afterwards the receiver employed the firm of Kobe & McKinnon, of Chicago, to appraise the property, and they appraised it at the total sum of $150,000. On February 3, 1899, the court made an order that the receiver receive bids for any and all of said real estate, and report the same to the court on March 18, 1899, at 9 a. m., and that all persons interested show cause at that time why any bids so received should not then be accepted. The receiver appeared at that time by Hay & Van Campen, his attorneys, reported a bid of Kobe & McKinnon of the lump sum of $85,000 for all of said real estate, and advised that the bid be rejected. Kobe & McKinnon appeared by their attorneys, Russell & Jamison, and moved that the bid be accepted. Certain of the stockholder creditors appeared by Mr. Lane and Mr. Gallagher, their attorneys, opposed the acceptance of the bid, and moved for a continuance for one month in order to get time to procure higher bids. The record proceeds:

"That motion was opposed by Judge Russell, and denied by Judge Elliott. Thereupon Judge Russell made a motion for continuance until April 8, 1899, and that motion was granted. Judge Russell, as one of the attorneys for Kobe & McKinnon, opposed each and every continuance had after April 8, 1899."

On April 8 the parties again appeared, and Lane and Gallagher moved for a further continuance in order to procure bidders. The court continued the matter to April 15. On the latter date the parties again appeared. Mr. Lane stated that he had found a bidder in Chicago who would offer $110,000 for the properties, but advised the rejection both of this bid and the Kobe & McKinnon bid as being too low. After a strenuous contest over the matter, Lane

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moved for a further continuance, and the court granted one, but for only three days,—to April 18. On the latter date the parties again appeared. Lane and Gallagher moved for a further continuance, and the court granted a continuance, but for one day only,—to the 19th. The same performance was gone through on that day, and a continuance obtained to the next day, April 20. On the latter day a syndicate of Minneapolis men appeared, and bid $110,000 for the real estate. Thereupon Kobe & McKinnon and the syndicate made successive bids against each other until the syndicate bid the sum of $123,000. The matter was then continued until the next day, when Kobe & McKinnon bid $123,025, and, with the consent of all parties, the bid was accepted. On April 18 the receiver filed his objections, in which he made a strong showing against accepting the bid of Kobe & McKinnon made on that day, but it does not appear that these attorneys did any more after that except appear formally at each hearing until April 20, when they consented to the acceptance of the bid of $123,025. In the meantime the contest went on between Lane and Gallagher on the one hand and the attorneys of Kobe & McKinnon on the other hand. The evidence is conclusive on these points, and also on the point that Lane and Gallagher, after strenuous and arduous efforts, procured the syndicate to organize and make the bid, which compelled Kobe & McKinnon to raise their bid $38,025.

Possibly, the evidence is not conclusive that the court ever intended to accept the original bid of Kobe & McKinnon. We cannot tell what the court had in his mind. But actions are louder than words. Every one interested was opposing the acceptance of this bid except the bidders themselves, and, if the court was not seriously contemplating the acceptance of it, why did he not reject it during all these 32 days of incessant and strenuous contest? Why did he so often refuse to continue the matter for more than one day or three days at a time if he was not exceedingly anxious to hang on to this bid, and was not seriously contemplating the acceptance of it? He knew that it would be practically impossible to get other bidders for this large amount of widely scattered property in one day or in three days. In my opinion, the evidence is

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conclusive that any intelligent attorney in the position of Lane and Gallagher would be bound to understand from the attitude of the court that there was imminent danger that this bid would be accepted, and that the only way to defeat the acceptance of it was by procuring higher bids. No prudent attorney would have done otherwise. Under the circumstances, the receiver and his attorneys would have been amply warranted in seeking other bidders with all the haste and diligence possible. They did not do so, and should now divide with Lane and Gallagher the fees for this part of the administration of the estate. I am therefore of the opinion that the orders appealed from should be reversed.

W. R. DUXBURY v. O. K. DAHLE.

December 20, 1899.

Nos. 11,810—(157).

Attachment against Nonresident—Affidavit.

The affidavit required by G. S. 1894, § 5289, is a jurisdictional prerequisite to the issuance of a valid writ of attachment against the property of a nonresident; and if none be filed, or one be filed which wholly fails to set out some fact required by law to be stated therein, no writ can lawfully issue.

Same—Collateral Attack.

If a writ of attachment be issued upon such a defective affidavit, and the defendant does not appear in the action, the writ and all subsequent proceedings, including the publication of the summons, entry of judgment, and issuance of execution, and sale thereunder, are null and void, and may be assailed collaterally.

Affidavit—Ground of Claim.

An affidavit for attachment which wholly fails to state the grounds of plaintiff's claim against defendant is fatally defective, and confers no jurisdiction to allow the writ.

Action of ejectment in the district court for Houston county. The case was tried before Kingsley, J., who found in favor of plain-

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tiff; and from a judgment entered pursuant to the findings, defendant appealed. Reversed.

James O'Brien, for appellant.

Duxbury & Duxbury, for respondent.

BROWN, J.

This is an action in ejectment to recover the possession of 80 acres of land situated in Houston county. One John B. Koetting was the former owner of the land, and both parties claimed title through him,—the plaintiff, under and pursuant to certain attachment proceedings; and the defendant, through various mesne conveyances. The plaintiff's asserted title, if valid, is superior to defendant's. So the question with respect to the validity of the attachment proceedings under which plaintiff so claims title is the only one which requires consideration. As we find such proceedings fatally defective, no other question need be considered. The plaintiff had judgment in the district court, and defendant appealed.

Said Koetting was the owner of said land on February 2, 1894. On that day one John Barth, receiver, commenced an action against said Koetting in the district court of Houston county to recover upon a judgment theretofore rendered in his favor and against Koetting in the circuit court of Milwaukee county, Wisconsin, for the sum of $111,449.74. Koetting was not a resident of this state, and, to obtain jurisdiction in said action so commenced in said district court of Houston county, said Barth caused to be filed with the clerk of said district court an affidavit for a writ of attachment against his property, setting forth therein such nonresidence of Koetting. Upon such affidavit, together with a proper bond, a writ of attachment was allowed by the court commissioner and issued by the clerk, under and pursuant to which the land in controversy was levied upon and attached. The summons in the action was served by publication, and on May 12, 1894, judgment was rendered and entered on default in favor of said Barth and against said Koetting for the sum of $115,669.16. Execution was issued upon this judgment, the land levied upon and sold, and at the sale struck off to one Samuel Kuster for $800.

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The plaintiff has succeeded to Kuster's title.

The complaint in this action sets out plaintiff's title in extenso. The commencement of the action in the district court of Houston county, the affidavit for attachment, bond, entry of judgment, issue of execution, and sale thereunder, and all other facts leading to plaintiff's title, are fully set out. The answer puts in issue about all the allegations of the complaint, and calls in question the validity of the attachment proceedings.

It is contended by defendant that the attachment proceedings were null and void for the reason that the affidavit for the writ was defective and insufficient, and conferred no jurisdiction on the court to issue or allow the writ. The affidavit is set out in the complaint, and the portion objected to is as follows:

"That a cause of action exists against the defendant and in favor of said plaintiff therein, and the amount of said plaintiff's claim therein is ——— sum of one hundred and eleven thousand four hundred and forty-nine and $^{74}/_{100}$ dollars, and the ground thereof is as follows: that is to say, that the defendant is not a resident of this state."

There is no other or further statement in the affidavit with reference to the ground of plaintiff's cause of action or claim. G. S. 1894, § 5289, provides, among other things, that a writ of attachment

"Shall be allowed whenever the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the ground thereof."

It is issued upon the order of the judge of the district court or court commissioner, in whom no discretion is vested. No investigation is to be made as to the truth of the facts set out in the affidavit. If an affidavit in the form of the statute be filed, the writ must issue. The proceeding by attachment against the property of nonresidents is purely statutory. Jurisdiction in such cases extends to the property attached, and no further. It is in derogation of the common law, and the statutory requirements must be substantially, if not strictly, pursued and complied with. If there be a fatal defect in any jurisdictional prerequisite, the proceedings are

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invalid, even though a writ valid on its face may have been issued, and a levy made thereunder. The general rule is that the affidavit is the foundation of the writ; and if none be filed, or one be filed which wholly fails to set out some fact required by law to be stated therein, there is no jurisdiction, and the proceedings are null and void.

There is no question but that the affidavit set out in the complaint, and which was the basis of the writ in question, is defective, in not stating the ground of plaintiff's claim. There is no attempt at a compliance with the statutes in that respect. It is the understanding of the bar of this state, so far as our knowledge extends, that a defect of this character is fatal to the jurisdiction of the court to allow the writ; and, if a writ be allowed and issued upon such an affidavit, the same and all subsequent proceedings thereunder are null and void. This is the doctrine and rule laid down by text writers generally, and is in accord with the great weight of authority. Waples, Attachm. (2d Ed.) § 157; 1 Shinn, Attachm. § 127; Drake, Attachm. (7th Ed.) § 87, et seq.; Van Fleet, Coll. Attack, § 263; 3 Am. & Eng. Enc. Pl. & Pr. 4, and cases cited. We hold, in line with these authorities, that the affidavit required by our statutes as a prerequisite to the issuance of a writ of attachment is jurisdictional; and if none be filed, or one be filed which wholly fails to set out some fact made essential by the statute, such as shown in this case, no writ can lawfully issue. We are not unmindful of the fact that the property seized under the writ and brought into court is what the court finally exercises jurisdiction over, but we cannot subscribe to the proposition that the steps pointed out by statutes to obtain such writ from the court are inconsequential, and in no sense jurisdictional.

The defect in the affidavit cannot be cured by amendment. Although amendments are permitted and allowed in most of the states as to informal errors and omissions, defects in matters of substance cannot be thus cured, except where provided for by statutes. This necessarily follows from the fact that the affidavit is jurisdictional. 1 Am. & Eng. Enc. Pl. & Pr. 680; 1 Shinn, Attachm. § 152.

The defect in the affidavit appears from the record, and is set out

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in the complaint. It thus affirmatively appears upon the face of the complaint that the proceedings under which plaintiff claims title to the land are void for want of jurisdiction, and such proceedings may be attacked collaterally. Drake, Attachm. § 876, et seq., and cases cited.

The case of Morrison v. Lovejoy, 6 Minn. 117 (183), is cited to the proposition that the affidavit is not jurisdictional. That case is not in point. Under the statutes in force when that case was decided, it was necessary that it be made to appear by affidavit that a cause of action existed against defendant; and the court there held that, inasmuch as the allowance of the writ involved a determination that such cause of action existed, it was a judicial act. But the statute on which that decision was based has since been changed, and no such determination by the officer allowing the writ is now necessary. The writ must issue, under existing statutes, upon the filing of the proper affidavit. The difference between the two statutes is pointed out in Braley v. Byrnes, 20 Minn. 389 (435).

Counsel also cite, as sustaining plaintiff's position, Cooper v. Reynolds, 10 Wall. 308; Matthews v. Densmore, 109 U. S. 216, 3 Sup. Ct. 126, and Voorhees v. Jackson, 10 Pet. 449. We have here under consideration, not a question whether a particular proceeding in court is due process of law, within the meaning of the federal constitution, nor to what extent an officer will be protected in serving a writ of attachment fair on its face, but issued on a fatally defective affidavit, but what is the proper construction to be given our statutes. If it can be said that the cases so cited are in conflict with our views on this question, we are not controlled by them. If a question should arise in the supreme court of the United States as to the law of this state on the subject in hand, that court will follow the decision of this court. Waples, Attachm. § 630.

It is also urged that because this court in Blake v. Sherman, 12 Minn. 305 (420), held that an attachment bond was subject to amendment and correction, on the same principle the affidavit should be held amendable, and consequently not jurisdictional. The contention is not sound. The statutes require a particular

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form of affidavit to be filed, but do not require any particular bond to be given. On the other hand, the bond is left in the hands of the officer allowing the writ. Such officer must, on allowing the writ, "require a bond on the part of the plaintiff, with sufficient sureties." Section 5290. If such officer erroneously decides that a defective bond is sufficient, such erroneous decision does not go to the jurisdiction to allow the writ. The error may be cured by filing a sufficient bond nunc pro tunc. See, on this subject, Schweigel v. L. A. Shakman Co., supra, page 142. Our conclusion is that the learned court below should have granted defendant's motion for judgment on the pleadings, and the judgment appealed from is reversed, with directions to do so.

Judgment reversed.

ANNA TROW v. VILLAGE OF WHITE BEAR.

December 20, 1899.

Nos. 11,822—(147).

Excessive Damages—New Trial.

Where excessive damages are awarded by a jury acting under the influence of passion and prejudice, the defendant is not entitled in every case to a new trial as a matter of right; but the trial court may, in the exercise of its discretion, if the degree of passion and prejudice be not such as to make it clear that the jury was influenced thereby as to other questions in the case, correct the error of the jury by a reduction of the damages to an amount deemed reasonable.

Reduction of Verdict.

Order of the trial court reducing the damages in this case *held* not erroneous.

Evidence.

Evidence considered, and *held* to sustain the verdict.

Appeal by defendant from a judgment of the district court for Ramsey county in favor of plaintiff for $848.43, after a trial before Kelly, J., and a jury. Affirmed.

C. D. & Thos. D. O'Brien, for appellant.

Jno. V. I. Dodd, for respondent.

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BROWN, J.

This action is one to recover damages for injuries to plaintiff's person, caused, as is alleged in the complaint, by a defective sidewalk located within the corporation limits of defendant village. A verdict was returned in the court below in plaintiff's favor for the sum of $1,400. The defendant moved that court for a new trial on the grounds: (1) Excessive damages, appearing to have been given under the influence of passion and prejudice; and (2) that the verdict is not justified by the evidence, and is contrary to law. The court made an order granting the motion unless plaintiff should consent to remit from the verdict all in excess of $800, but denying it in case she should so remit. Plaintiff filed a proper remittitur, judgment was thereupon entered in her favor for $800 and costs, and defendant appeals.

1. The first question presented by appellant is whether a new trial should not be granted, as a matter of right, when it is determined by the trial court that excessive damages have been awarded by a jury under the influence of passion and prejudice.

The position of appellant's counsel is that, where it is determined by the trial court that excessive damages have been so awarded by a jury, a new trial should be granted, and the error of the jury cannot be corrected by a reduction of the verdict. Taken from a statutory point of view, there is, in the opinion of the writer, much logic and good sense in counsel's position. Our statutes provide for granting a new trial in cases where excessive damages have been awarded by a jury acting under the influence of passion and prejudice, and contain no exception or saving clause under which the trial court may correct the erroneous conduct of the jury by reducing the verdict. A strict following of the statutes would therefore require a new trial whenever such a verdict is returned. But the practice of correcting the error of the jury by reducing the damages to what the trial court deems reasonable and fair, not only in cases where it is found that the jury was actuated by motives other than passion and prejudice, but in cases where there was no other apparent cause, is too firmly rooted in this state to be now departed from.

Of course, in cases where there is such a degree of passion and

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prejudice as to make it clear to the court that it permeated the entire case, and influenced the jury upon questions other than damages, such misconduct on the part of the jury (for it amounts to misconduct) will not be overlooked, or any attempt made to correct it by a reduction of damages. In such cases an unconditional new trial will always be granted. But in cases where the trial court, in the exercise of a sound discretion, determines that the passion and prejudice did not influence the jury as to other questions in the case, and that the verdict is right, except that it is excessive, the error of the jury may be corrected by a reduction of the amount of the verdict to such sum as the court deems proper. We are not able to say, from the record before us, that the trial court erred in reducing the verdict in this case, and must sustain the order.

2. We have examined the evidence with care and patience, and conclude that the verdict, as to the other questions, approved as it has been by the trial court, cannot be disturbed.

Judgment affirmed.

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ELSIE EDLUND v. ST. PAUL CITY RAILWAY COMPANY.

December 20, 1899.

Nos. 11,843—(153).

Misconduct of Juror—Silence of Record—Affidavit of Counsel.

The rule that what occurs at the trial of an action, as a part thereof, must be made to appear in a settled case or a bill of exceptions, applied in a case where, upon a motion for a new trial, on the ground, among others, of the misconduct of a juror, an attempt was made to show by the affidavit of counsel that each and all of the jurors were questioned, when called, as to their knowledge of the facts in such case, and that each and every one denied having any knowledge whatsoever of the facts.

Complaints of Pain to Physician.

The rule laid down in Williams v. Great Northern Ry. Co., 68 Minn. 55, as to the admission of testimony of a physician of the statements and complaint of present, existing pain and suffering, made by a patient at the time he is in attendance as such physician, followed.

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Negligence—Charge to Jury.

Held, that upon the evidence as to defendant's negligence, either in the construction of a temporary track, or in the management of a car thereon, the court did not err when it refused to charge as requested by defendant.

Action in the district court for Ramsey county to recover $10,000 damages for personal injuries. The case was tried before Bunn, J., and a jury, which rendered a verdict in favor of plaintiff for $3,500; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Munn & Thygeson, for appellant.

S. C. Olmstead, for respondent.

COLLINS, J.

It is first claimed on this appeal that the motion for a new trial should have been granted because of the alleged misconduct of the juror Soucheray. This juror either knew when he was sworn as such, or discovered soon after the trial began, that he had some knowledge of the force of the collision in which plaintiff claims she had received an injury, having been on the car which was run into that on which plaintiff was a passenger; and he failed to disclose the fact of his having been on one of the cars when the accident occurred. We shall assume that, if properly shown at the hearing of the motion, the juror was guilty of such misconduct as would entitle defendant to a new trial, but it must not be understood that we so hold. But the fact of Soucheray's misconduct was not made to appear in a proper manner. There was no bill of exceptions, and on the settled case there was nothing from which it could be gathered that Soucheray, when called as a juror, was informed of the names of the parties or of the nature of the case, or was put in possession of any facts which would have indicated to him that he had been present when the cars collided. The record of the trial was entirely silent as to what questions, if any, were put to the jurors when they were called. Attached to the notice of motion, and made a part of the same, was an affidavit, made by one of defendant's counsel, in which it was stated that all of the jurors, including Soucheray, were advised, when impaneled, of the character of the case, and were told sufficient of its details to identify

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it, and that every one, including Soucheray, stated that he had no knowledge of the facts. But this method of attempting to show a part of the proceedings at the trial was unauthorized and improper. What occurred at the trial, as a part thereof, cannot be established by means of affidavits, but must be made to appear as a part of the settled case or bill of exceptions. See Ham v. Wheaton, 61 Minn. 212, 63 N. W. 495. The necessity of such a rule is manifest.

It is claimed, second, that the court erred when it refused to instruct the jury, as requested by defendant, as to its liability on account of the Selby avenue derailment. Upon a careful reading of the evidence, we are of the opinion that the question of defendant's negligence on this particular occasion was for the jury. A temporary track had been laid in the street, by putting ties down on top of well-worn cedar block pavement; and on these ties 50-pound rails, which had been used a number of years, were spiked. Except at the ends of this temporary track, where it curved in order to connect with the permanent track, there was no filling in or ballasting. A rail broke between the curves on this temporary track, the reason not being perfectly apparent. But we think, on the testimony as to the manner of constructing the track, and of operating the car in question over it, the instruction was properly refused.

It is contended, third, that it was error for the court to allow a physician who attended the plaintiff, and made an examination of her injuries, to testify as to what statements and complaints she made to him at that time of existing pain and suffering. The question propounded to the physician was confined to statements and complaints of present pain and suffering, and a responsive answer was clearly admissible under the decision in Williams v. Great Northern Ry. Co., 68 Minn. 55, 70 N. W. 860. See also cases therein referred to. The error complained of is covered by that decision, and the court was right in overruling the objection.

This disposes of the case, and the order is affirmed.

On December 29, 1899, the following opinion was filed:

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PER CURIAM.

A reargument is asked for, on the ground that this court erred in holding that the fact, if it was the fact, that when the jury was impaneled the defendant's counsel, after stating to them the names of the parties and the alleged facts constituting plaintiff's cause of action, inquired of all if any of them knew anything about the facts of the accident, to which all, including Soucheray, answered that they did not, could not be shown by affidavits, but, being a part of the proceedings on the trial, could only be made to appear as part of a settled case or bill of exceptions. Withdrawing what was said on that point, and leaving it undecided, we are still of opinion that the motion for a new trial was properly denied.

All that appeared was that Soucheray was on the Interurban car which collided with the car on which plaintiff was a passenger, and was sitting with his wife in a seat about midway of the car, which was packed with passengers, and did not see or hear anything in connection with the collision, and knew nothing of the causes or attending circumstances thereof, except that he felt the jar when the cars collided; that he did not leave his seat; that the occurrence had entirely passed out of his mind, and, when he was interrogated at the trial by defendant's counsel, he did not recall it at all, or recognize it as the same referred to by counsel, until the details of the occurrence had been brought out in the evidence on the trial. The collision was an admitted fact, both in the answer and upon the trial. The only issue as to that accident was as to the extent of the injuries, if any, sustained thereby by the plaintiff, of which Soucheray knew nothing, or did not even know that she was on the other car. The cause of action mainly urged on the trial was for injuries alleged to have been sustained on the same day from another accident, occurring to a car on the Selby avenue line, in which plaintiff was also a passenger, and of which it is not claimed that Soucheray knew anything. Upon this state of facts, there was no error in the court's refusing to grant a new trial. It was, at most, a matter addressed to the discretion of the court.

Application denied.

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E. W. BACKUS LUMBER COMPANY v. SCANLON-GIPSON LUMBER COMPANY.

SAME v. R. C. JEFFERSON and Another.

December 20, 1899.

Nos. 11,868—(160).

Driving Intermingled Logs.

Where the logs of various owners have become intermingled in a driving stream, so that they cannot be separated, and an owner fails and neglects to furnish enough men to drive his own, and thus compels another owner, also engaged in driving, to furnish more than his share of men and to perform more than his share of the work of driving the mass of logs to market, the latter may file a lien, maintain an action, and recover reasonable compensation for his services of the former, under the provisions of G. S. 1894, § 2466. It is immaterial that the owner in fault is also engaged in driving the mass.

Same—G. S. 1894, § 2466.

When logs are intermingled in a driving stream, so that they cannot be separated, one owner cannot arbitrarily and unreasonably put an unnecessary force of men upon the work, simply because he is in haste to float his own logs to market, and recover under the statute. Nor can another log owner unjustly hinder and obstruct the stream with his own drive, by putting on too few men for his own work, and thus prevent a recovery. Good faith and reasonable prudence are demanded of all who have an equal right to use the water.

Construction of Statute.

The statute in question is remedial in its nature, and should have a liberal construction.

Reasonable Compensation.

Held that, in ascertaining what plaintiff was entitled to, as reasonable compensation for aiding in driving defendants' logs, the court could take into consideration the entire expense incurred by plaintiff when making a drive of the mass.

Evidence.

Held, further, that certain evidence introduced, as to the cost to plaintiff of water from reservoirs and the expense of certain improvements previously made on the stream by plaintiff, was not prejudicial to defendants.

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Two actions in the district court for Hennepin county, against Scanlon-Gipson Lumber Company and R. C. Jefferson and another, copartners as Jefferson & Kasson, respectively, to recover compensation for driving logs. The cases were tried together before Elliott, J., who found in the first case that plaintiff was entitled to recover $428.28 with interest, and in the second that plaintiff was entitled to recover $1,897.20 with interest. From orders denying motions for a new trial, defendants appealed. Affirmed.

A. Y. Merrill and *R. J. Powell*, for appellants.

George H. White and *Alvord C. Egelston*, for respondent.

COLLINS, J.

The above-entitled actions were brought under G. S. 1894, § 2466, to recover reasonable compensation for driving the logs of the defendants, the plaintiff asserting that it was hindered and obstructed in driving its logs by those of the defendants which had become intermingled with the plaintiff's logs by reason of the defendants' negligence. For convenience, these cases were tried together, a jury being waived by the parties. Thereafter the court filed findings of fact and conclusions of law in each, judgments being ordered in plaintiff's favor for the respective sums found due.

The findings of fact were sufficient, under the statute, to warrant the conclusions of law, and, in addition, the court found that each defendant negligently allowed its logs to intermingle with those of plaintiff, and to obstruct the stream. In the Jefferson & Kasson case, the court found that the defendants had performed some labor in driving their logs, but that the same was wholly insufficient and inadequate to accomplish either the driving, or to prevent, avoid, or remove the obstructions, or to avoid or prevent the intermingling of defendants' logs with those of plaintiff, and the plaintiff was in consequence thereof obliged to, and actually did, drive the Jefferson & Kasson logs. There was no such finding in the action brought against the Scanlon-Gipson Company, although it is contended by counsel for defendants that the evidence on this point was quite as abundant and convincing in the one case as in the other, and that the court should not have distinguished between them in respect to findings. But, in our opinion, such a finding is of no importance.

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The position of defendants' counsel is that, to entitle one to recover compensation, by virtue of the statute, for driving intermingled logs, he must assume entire charge of the logs, and drive them clean; and that the statute contemplates such cases only as arise where the owner of logs has abandoned them absolutely, and therefore, where the owner is present and engaged in good faith in driving the intermingled logs, there can be no recovery; and that, where the owner of logs, which have become intermingled with the logs of others, does not furnish a proportionate number of men, and the number of men he does employ on the drive is not sufficient to drive his logs in a reasonably expeditious manner, the recovery, if at all, must be at common law, for negligently obstructing the highway, and not under the statute, for compensation. To use their own words as found in their brief, the question is, "Does the statute authorize a recovery where it appears that the owner has never abandoned his drive, and the only basis of the plaintiff's claim is that he employed proportionately more men than the defendants did?"

We fail to find anything in the statute which warrants counsel in contending that, to recover compensation for driving the logs of another, the party driving must assume entire charge, and that only such cases as arise when the owner has absolutely abandoned his logs are contemplated or covered by it. The statute would prove of little value with such a construction. The owner of logs which were intermingled, or which were obstructing a stream, to the hindrance and detriment of another log owner, could very easily prevent the latter from assuming entire charge of the drive, and there would be no abandonment so long as a single person remained at work. The statute, with such an interpretation, would prove a farce. Counsel for defendants cite Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109, as authority for their contention, but there is no foundation for their claim. That decision was to the effect that, to invoke the aid of the statute, a party must actually drive the logs of another, and that it is not enough if he simply gets them out of his own way, making no further effort to keep them afloat in the stream. The facts here are wholly different.

The evidence now before us shows clearly that, in the driving of

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plaintiff's logs, it was hindered and obstructed by the defendants', which had been put into the stream below a portion of plaintiff's. The stream was long, but narrow. It had no natural reservoirs at its head, and the water ran out very quickly. An energetic, speedy drive was absolutely required, according to the proofs, and plaintiff was necessarily obliged to render services and to perform labor in driving defendants' logs; and the value of these services and labor, and a reasonable compensation for the same, were found and determined by the court below. Certainly, the statute contemplates and includes such a case. As the plaintiff's logs came down the stream, they became intermingled with defendants', so that they could not be separated, and it became absolutely necessary for all to be driven together. The defendants had failed to put on sufficient men for the work of driving their own logs, and the result was that their logs hindered and obstructed the plaintiff's operations in its attempt to float its own logs to market. The plaintiff was compelled to drive defendants' logs with its own, and to furnish men for that purpose, and is entitled to recover reasonable compensation therefor.

The statute does not contemplate, in order to authorize one log owner to recover of another for labor performed or services rendered in driving intermingled and obstructing logs, that the latter must have abandoned all efforts to get his logs to market. It was enacted that an adequate remedy might be had, through the enforcement of a lien, where existing natural circumstances had obliged one log owner to do the work of another and for his benefit. This is just what the exigencies of the situation compelled plaintiff to do on this occasion. The right to recover depends in such cases on establishing at the trial all of the facts set forth in the statute as necessary to support an action, and the material inquiry is, does the plaintiff bring his case within the requirements of the statute? The statute is in aid of business and commerce, is remedial in its nature, and should have a liberal construction, that its purpose may be effected. Merriman v. Bowen, 33 Minn. 455, 457, 23 N. W. 843.

Counsel for defendants argue that, if the statute is to be applied in cases like the one at bar, there will arise many practical difficul-

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ties when attempting to enforce it and to do justice. But, as was said in reference to a similar statute in Foster v. Cushing, 35 Me. 60, at page 62:

"In this, as in all other transactions, good faith, sound discretion, and prudent management, so far as the rights of others are involved, are required on the part of the individual by whom the logs are driven. The plaintiff having a right to commence his labors on his own logs at such time as in the exercise of a sound discretion he may deem expedient, it is not easy to perceive why his rights under the statute, to drive all logs so intermixed with his own 'that the same cannot be conveniently separated,' do not forthwith accrue when the logs specified in the statute shall have been driven. If a question arises whether the person driving commenced at a proper time or exercised good faith towards the owner of the logs, it is for the determination of the jury."

One log owner cannot be permitted arbitrarily and unreasonably to put upon the drive an unnecessary force of men, simply because he is in haste to float his own logs to market. Nor can another log owner be allowed unjustly to hinder and delay the drive by putting on too few men on his own logs, and thus to selfishly appropriate the work of another, whose logs are inseparably intermingled, and necessarily must be driven with his own. Good faith and reasonable prudence are demanded of all who have an equal right to use the water, as had all of these parties. The plaintiff's claim is for driving defendants' logs of necessity, where one party has the benefit of another's service, for which in equity he ought to make compensation. It is obvious that where a stream is filled with the logs of different owners, all intermixed, no one owner can use the stream for driving his logs, without at the same time driving the logs of others; and the statute goes upon the equitable principle that, where labor is rendered under such circumstances, the party rendering the service is entitled to a reasonable compensation for it from the one who is benefited thereby. Wisconsin v. D. F. Comstock, 72 Wis. 464, 40 N. W. 146. See also Megquier v. Gilpatrick, 88 Me. 422, 34 Atl. 262.

Counsel also contend that there was an agreement for a joint drive, and therefore plaintiff cannot recover. There is no finding of fact as to such an agreement, and counsel failed to request the trial court to make such a finding.

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Counsel further contend that plaintiff should not recover on the proofs here, because another lot of logs, owned by Walker Bros., became a part of the drive at Rice Lake thoroughfare, being intermingled at that point with plaintiff's and defendants'. The evidence as to what part Walker Bros. took in driving is meager, but they had men at work, and it does not appear that they did not have sufficient for the handling and driving of their proportionate share of the mass. What the presumption would be in such a case we need not determine. It is apparent that at the trial all parties assumed that Walker Bros. furnished their share of the men and did their share of the work, no more and no less. The present claim seems to be an afterthought.

In ascertaining what was due to plaintiff as reasonable compensation for aiding in driving defendants' logs, the court below took into consideration the entire expense incurred by plaintiff in driving its own and defendants' logs. It then prorated, as between the parties. Under a statute in which it is provided that "reasonable compensation" may be recovered, as it is in ours, it has been held that, when intermingled logs have been driven, the measure of damages is the pro rata expense of driving the mass. Bearce v. Dudley, 88 Me. 410, 34 Atl. 260.

There was also introduced in these causes evidence that the pro rata share of the expense was the reasonable value of the labor. And it appears to a mathematical certainty that the testimony as to what plaintiff paid for water from reservoirs, and the cost of improvements previously made in the stream in question, objected to by defendants' counsel (the court reserving its ruling, in effect), was not taken into consideration in arriving at the amounts due to plaintiff. The defendants were not prejudiced by this testimony. The findings of fact are supported by the evidence, and obviously they warranted the conclusions of law.

Order affirmed in each case.

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JULIUS W. LANDQUIST v. SWANTY SWANSON.

December 20, 1899.

Nos. 11,875—(146).

Contract—Breach—Interpretation of Contract from Circumstances.

The intent, meaning, and scope of a contract must be ascertained and determined from a consideration of the condition and surroundings of the parties at the time it is made, the objects and purposes to be accomplished or attained, and such other facts as throw light on the subject. Within this rule, it is *held* that the failure and neglect of defendant, complained of by plaintiff as a breach of the contract set up in the complaint, were not within the scope or meaning of such contract, and consequently not a breach thereof.

Action in the district court for Hennepin county to recover $625,000 damages for breach of contract. From an order, Simpson, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

Jno. W. Arctander, for appellant.

Frank M. Nye, for respondent.

BROWN, J.

This is an appeal from an order sustaining a demurrer to plaintiff's complaint. The action is one to recover the sum of $625,000, damages alleged to have been suffered by the plaintiff by reason of defendant's failure to perform the contract set up in the complaint.

Although the complaint is quite long, covering 115 folios, the main features of the cause of action may be sufficiently stated without reciting all that is stated therein. In 1896 one Scougale was the owner and holder of certain mining properties located in the state of Washington, and gave the plaintiff an option for the purchase thereof, the precise terms of which do not appear, unless they were the same as given plaintiff and defendant jointly, as will be presently stated. Plaintiff was without means, and wholly unable to comply with the terms of the option, and solicited defendant to join him, and furnish the money with which to carry the same through. Subsequent negotiations between the parties

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resulted in a contract between them by which they undertook and agreed to jointly make the purchase of the mining properties, and to share equally in all profits arising from the subsequent operation of the mines. The complaint sets out the defendant's promises and agreements under this contract as follows:

"And in consideration of plaintiff then and there, by the terms of said agreement, allowing said defendant to come into said deal, and into said great prospective profits expected to be derived from the same, 'on the ground floor,' so to speak, the defendant then and there, and by the terms of said agreement, so then and there entered into, promised and agreed with said plaintiff that he, the said defendant, would well and truly pay from his own means and moneys all the moneys necessary to be paid or laid out for the purpose of procuring, securing, and carrying through the purchase of said mining properties, and also all moneys necessary to be paid out and laid out, or by said parties to said agreement deemed necessary to be paid out or laid out, or expended or advanced, for the purpose of securing and carrying through said deal, or for the further promotion of said mining enterprise, as well as for the purpose of securing the equipment of said mining property necessary for the most proper and profitable manner of operating the same as a hydraulic placer mine in the most economical and in the cheapest way, and in a way which would involve the least amount of loss or sacrifice on the part of said parties to said agreement, or any of them, as well as on the part of the corporation then and there intended and contemplated to be formed for the purpose of operating said mining property and placer mine; and, further, to pay and lay out all such moneys without any delay, and as soon as the same should be required and demanded for the purpose of carrying out said deal, and the mining enterprise and the mining operations thereby contemplated."

Thereafter plaintiff procured said Scougale to enter into a contract with plaintiff and defendant whereby said Scougale agreed to sell and convey the properties for the consideration of $50,000, and the agreement on the part of plaintiff and defendant for the organization of a corporation by the three parties for the purpose of operating the mines, and the delivery to him of 300,000 shares of the capital stock thereof. This contract is quite long, and all its provisions need not be stated. Pursuant thereto the corporation was organized, and the stock issued and delivered according to its terms, and Scougale executed and delivered to the corporation the deed of the properties. There is no allegation in the com-

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plaint of a breach of the contract on the part of the defendant up to this time. So far as appears, he fully performed the same.

The particular breach complained of is found in the following facts: Under the laws of the United States with reference to mining claims, it is the duty of the holder thereof to do what is termed "assessment work" to the amount of $100 each year. A failure to comply with this requirement forfeits the claim, and subjects it to entry by any other person. This assessment work may be done by actual mining operations, or in the form of permanent improvements on the property. The complaint alleges: That it was the duty of Scougale to do such work, or cause it to be done. That defendant learned that such work could be done in the form of permanent improvements on the property, and that, in consideration of an agreement on the part of Scougale to so comply with the law and so do the work, he (defendant) promised and agreed to pay Scougale the cost thereof "out of his own pocket." Scougale went on under this arrangement, and made improvements on the property to the value of $800. Defendant paid $200 towards reimbursing him, but has refused to pay the balance. The complaint further alleges that this agreement to reimburse Scougale was made by defendant in behalf of himself and plaintiff, and that he (plaintiff) fully ratified the same.

This is the breach of contract for which plaintiff seeks to recover the very modest sum of $625,000; the contention on his part being that the defendant's agreement with Scougale to pay for the assessment work is covered and included in the contract with plaintiff, the terms of which we have set out in full, and that the failure to perform the Scougale contract was a failure to perform the contract with plaintiff as well.

The vital question in the case, as we view it, is whether this contention on plaintiff's part is sound. We think it is not, and for these reasons: In construing a contract, reference must be had to the condition and surroundings of the parties at the time it is made, the objects and purposes to be attained, and all circumstances throwing any light on the subject. In this case plaintiff had an option for the purchase of valuable mining properties, which, for want of funds, he was unable to carry out. His object

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and sole purpose in joining defendant with him in the transaction were to obtain the necessary means to complete the purchase and set in motion actual mining operations. Defendant's promise and agreement to pay whatever was necessary to carry the transaction through is, as suggested by plaintiff's counsel, broad and comprehensive; but it cannot be construed to cover or include any liabilities other than such as fell upon the plaintiff, or upon plaintiff and defendant jointly, in carrying the transaction through. To construe it as including and covering the agreement to pay Scougale the cost of the assessment work, which was, so far as the complaint shows, wholly unknown to both plaintiff and defendant at the time of their contract, and which was the exclusive duty of Scougale to do and perform, would be to broaden the contract to an unwarranted extent, and to burden defendant with an obligation in no way in the contemplation of the parties at the time it was made. If defendant discharged every pecuniary obligation falling upon plaintiff, or upon plaintiff and defendant jointly, which arose in the course of and in securing and purchasing the mining properties, or for the purpose of promoting the mining enterprise, he fully performed his contract, and cannot be charged with liability to plaintiff for a failure to pay Scougale.

The complaint does not show that plaintiff was under any obligation to do the assessment work, or to pay any part thereof, or that he was under any duty or obligation whatever with respect thereto. He never paid any part of the claim to Scougale, nor can he be compelled to. The complaint alleges that it was Scougale's duty to do this work, and it does not appear to have been imposed upon plaintiff and defendant, or upon the corporation, by the contract by which Scougale transferred the mines to the corporation. Plaintiff has lost nothing, has been in no way injured or damaged, and cannot be heard to complain of Scougale's loss. We therefore hold that the complaint fails to state a cause of action, and the demurrer thereto was properly sustained.

It is unnecessary to refer to other questions argued by counsel, except to remark, in taking leave of the case, that the damages claimed by plaintiff, if it be conceded that the complaint shows a

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breach of contract for which a recovery could be had, are too remote, and could not be recovered.

Order affirmed.

EDITH M. THIBERT v. SUPREME LODGE, KNIGHTS OF HONOR.

December 20, 1899.

Nos. 11,883—(150).

Benefit Societies—Articles and By-Laws.

The rights of members in beneficial insurance associations must be made to depend upon the articles of association and the by-laws which have been adopted; and, generally speaking, the body which is authorized to make by-laws may change, amend, or repeal those already in existence. But changes, amendments, and repeals are subject to the restrictions and limitations of the charter or articles of association, and of the by-laws themselves, and are also subject to the implied condition of being reasonable.

By-Laws.

By-laws in operation when a member enters an association may be reasonable and valid as to him, on the ground of his having assented thereto when accepting membership, and yet be unreasonable and invalid as to present members when adopted as changes and amendments to existing by-laws, such members not having assented thereto in any manner.

Notice of Assessments.

When T. became a member of a subordinate lodge, and received a beneficial insurance certificate from defendant corporation, he was entitled, under the by-laws, to written or printed notice from the reporter of such lodge, dated on the first day of the month, in case the assessments and levies for such month for the payment of death claims exceeded or were less than two in number. Subsequently the lawmaking body abrogated the provision, and enacted that on or before the last day of each month every member should pay the amount of each assessment levied, and, failing to pay, should stand suspended, and not entitled to the benefits of the insurance fund. It was further provided in the amended by-laws that: "Each subordinate lodge may, at its option, provide for notification to its members of the number of assessments thus levied, which may be by written or printed notice, or by newspaper containing the supreme reporter's official notice of such levy, mailed or personally de-

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livered to the members; but no failure on the part of such lodge to give notice to members, or failure to receive such notice shall operate to relieve from suspension any member who shall fail to pay the assessments as required by section 7 of this article." It was not shown that T. had any knowledge of the change when he died, November 19, 1893, not having paid any part of three assessments levied and payable on or before the last day of October. *Held* that, as to him, the change and amendment in the by-law in force when he became a member was unreasonable and of no effect, and that it is immaterial that under the by-law above quoted the subordinate lodge had designated a newspaper for the publication of notices, in which notice of these assessments had been published, and that a copy of such paper had been duly mailed to T.

Evidence.

There was testimony from which the jury could have found that about the middle of October the reporter of the subordinate lodge notified T., in person, of these three assessments, and that T. promised to make payment before he went away to work. He did not pay as he promised. *Held*, that if the jury had found that this personal notice was given and the promise made, a reasonable time for making payment having expired before T. died, plaintiff was not entitled to recover on the certificate.

Action in the district court for Houston county to recover $2,000 on a benefit certificate. The case was tried before Kingsley, J., who directed a verdict in favor of plaintiff for the amount demanded. From an order denying defendant's motion for judgment notwithstanding the verdict, but granting its motion for a new trial, defendant appealed. From the order, so far as it granted a new trial, plaintiff appealed. Affirmed as to defendant's appeal. Dismissed as to plaintiff's appeal.

E. H. Smalley, for plaintiff.

James O. Pierce, for defendant.

COLLINS, J.

Jean Louis Thibert was in his lifetime a member of a subordinate lodge of the Knights of Honor. The defendant is incorporated as the supreme lodge of such Knights, its purpose being to collect and disburse what is known as a "Widows' and Orphans' Benefit Fund." The subordinate lodges send delegates to their state lodges annually, and the latter send delegates to the supreme

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lodge, which also holds annual meetings. The power to alter, amend, and enact by-laws for the collection, control, and disbursement of the fund before mentioned is vested in the supreme lodge, and may be exercised at its annual meetings.

Thibert made application in writing in February, 1892, to become a member of the subordinate lodge at Chippewa Falls, Wisconsin, which was favorably acted upon; and by reason thereof the defendant issued to him a benefit certificate bearing date March 29, 1892, by which defendant agreed to pay out of the fund before referred to the sum of $2,000, upon being furnished satisfactory evidence of Thibert's death, providing he was a member in good standing when his death occurred, and had not been suspended for failing to pay dues and assessments to the fund. A brother was named as beneficiary. In his application he stipulated that his beneficiary should only be entitled to payment in case he (Thibert) should comply with the laws, rules, and regulations then in force or subsequently enacted; and in the certificate it was provided that payment should be made only upon condition that Thibert complied

"With the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government."

Thibert died November 19, 1893, and thereupon the brother assigned the certificate to his widow, the plaintiff, and she brought this action. At the conclusion of the trial, defendant's counsel moved the court to direct a verdict for his client upon all of the evidence. The court denied this motion, and instructed the jury to return a verdict in favor of the plaintiff for the full amount of the certificate, which was done. Upon a settled case, defendant's counsel moved for judgment against plaintiff notwithstanding the verdict, and, if that was denied, then for a new trial; and the appeal is from an order denying the motion for judgment, but ordering a new trial.

When Thibert received his certificate, in 1891, what were known as the by-laws of that year were in force. And there was at all times an officer of defendant known as "Supreme Reporter." One of the 1891 by-laws provided (section 2 of article 7):

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"On the 20th day of each month the supreme reporter shall determine the number of assessments, if any, necessary to provide for the payment of deaths which may be registered during the ensuing month, shall levy the same, and shall immediately mail notice thereof to each lodge. If the number of assessments so determined be greater or less than two in any month, each member shall be notified thereof at once by the reporter of his lodge, by a notice bearing date of the first day of said ensuing month."

Another by-law was in the following words (section 3, art. 7):

"Call of Assessments. On the first day of each month, if it be necessary in order to provide additional funds for the payment of death benefits, a call shall be made upon each lodge for the amount of such assessment or assessments as were made on the first day of the preceding month, on all members upon whom the degree had then or previously been conferred."

There was another (section 7 of article 7) as follows:

"Payment of Assessments. On or before the last day of each month each member shall pay the amount of two assessments, unless the number of assessments due and to be paid during such month shall have been determined to be greater or less than two, in which event he shall pay the amount of assessments thus determined. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widows' and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order."

While under the head of "Notice of Assessments" (section 6, art. 7) was one in this language:

"Notice of Assessments. Subordinate lodges may, at their option, notify members of assessments. But neither the giving of such notice, nor the failure to do so, shall affect the standing of the member in case he fails to pay the assessments as required by section 7 of this article."

From these by-laws it will appear that in 1891, when Thibert obtained his certificate, it was the duty of an officer of defendant, called the "Supreme Reporter," to determine on the 20th day of each month the number of assessments which would be needed to provide for and pay death claims duly proven or registered for the coming month, and to levy the assessments so determined, of which

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levy he was to give immediate official notice to each subordinate lodge. This levy was in anticipation of deaths, and evidently the intention was thus to hasten payment of claims. If the assessment was for more or less than two deaths, it was incumbent upon the reporter of each subordinate lodge to give notice, of date the first day of the month in which payment was to be made, to each and every member. It is quite clear, from the fact that this notice was to be dated, that written or printed notice was required. Payment of two assessments on or before the last day of each month was imperatively required of each member, unless the number of assessments had been determined to be greater or less than two. In such case notice was necessary, before the member was in default. If payment was not made, within the month, of any assessment required by the levy, the member so failing to pay stood suspended by operation of law; and from that time, until duly reinstated, his beneficiary was not entitled to participate in the fund we have mentioned. Failure to pay worked the suspension from membership, and suspension, in itself, terminated all claim upon the benefit fund.

We have quoted a by-law upon the subject of "Notice of Assessments." This by-law is, as are nearly all we have examined in this case, somewhat awkward in its construction, and a little difficult to harmonize with other laws adopted by the supreme lodge. But, as we construe this particular by-law, it referred solely to some rule of a subordinate lodge concerning other or different or additional notice to members, and not to the notice to be given by the reporter of each lodge in case the assessments levied were more or less than two. It authorized the subordinate lodges, at their option, to provide for the giving of notices of all assessments,—for notice, for instance, of assessments where but two were levied, no notice of any kind in case of two standing assessments being required by any other by-law. A by-law of the defendant corporation of such value and importance to every member as was that which imperatively imposed upon the reporters of the subordinate lodges the duty of notifying each member of the number of assessments, in case they exceeded or were less than

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two, should not be wiped out of existence by so crude a provision as the one quoted.

We are therefore of the opinion that when Thibert received his certificate he was entitled to written or printed notice, unless waived, from the reporter of his lodge, in all cases where the assessment was for a greater or less number than two. If, then, the law of 1891 is to govern the case, he was not in default when he failed to pay the amount due for these assessments made by the supreme reporter September 20, 1893, numbered 381, 382, and 383, of which the reporter of his lodge was duly advised; said assessments being payable on or before the last day of October. And as a consequence he was not a suspended member when he died, in November.

But defendant's counsel insists that, in any event, Thibert was suspended because he failed to pay two of the three assessments during October. The argument is that under the by-laws it was incumbent on him to pay the amount of two assessments at or before the last day of each month, and, if he neglected to do this, he stood suspended under all circumstances. But the by-law does not so read, and should not be so construed. In fact, if it were of doubtful construction, it should not be interpreted in aid of an attempt to work a forfeiture. The by-law is that the member shall pay the amount of two assessments each month, unless the number due and to be paid shall have been determined to be a greater or less number than two, and in such case the member shall be notified in accordance with another by-law. The number of assessments determined upon for the month of October was three. The notice was not given, and the by-law, in express terms, provided that it should be. The defendant cannot escape liability on the ground that, while notice was positively demanded in case the assessments were more or less than two, Thibert should have done something not required of him. There was no by-law which imposed upon him the duty of paying two assessments, without notice, when three had been determined upon, although it is not unlikely that this would have been his duty, without notice, if the number determined upon had been two.

But the principal question on this appeal arises out of the fact

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that in 1893 the by-laws were changed and amended; and it is the contention of defendant's counsel that Thibert was brought within the influence and control of these changes and amendments, because of the agreement that he should be, found in his application to defendant corporation, and because it was stipulated in the certificate on which this action is founded that it is issued upon condition that he complies

"With the laws, rules, and regulations now governing this order, or that may be hereafter enacted for its government."

It appears that by changes and amendments in 1893 the requirement as to notice by the reporter of each lodge, to every member, of the number of assessments, in case such assessments were more or less than two, was entirely abrogated, and a new plan adopted; section 2 of article 7 being amended so as to read thus:

"On the 20th day of each month the supreme reporter shall determine and levy the number of assessments, if any, necessary to provide for the payment of benefits on the deaths which may be registered during the coming month: provided, however, that the levy of assessments upon members initiated on or after the first day of July, 1892, shall not exceed one assessment per month during the first six consecutive months, nor two assessments per month during the next eighteen consecutive months, of membership. The supreme reporter shall immediately mail notice of such levy of assessments to the reporter and financial reporter of each subordinate lodge."

And section 3 of the same article was amended so that it read as follows:

"Each subordinate lodge may, at its option, provide for notification to its members of the number of assessments thus levied, which may be by written or printed notice, or by newspaper containing the supreme reporter's official notice of such levy, mailed or personally delivered to the members; but no failure on the part of such lodge to give notice to members, or failure to receive such notice, shall operate to relieve from suspension any member who shall fail to pay the assessments as required by section 7 of this article."

And at the trial the defendants offered to show that after this amendment Thibert's lodge had, under this section, designated a newspaper published in Boston, Massachusetts, as the one in which

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official notices of assessment and levy should be given, and that notice of the October assessments and levy, numbered 381, 382, and 383, was so given, a copy of the paper being mailed to each member of said lodge. The offer was rejected. There was no attempt to prove that Thibert participated in the action of the lodge on this matter, or that he ever knew of it. Section 7 of said article 7, relative to the payment of assessments, was also amended in 1893 so that it read:

"On or before the last day of each month each member shall pay the amount of such assessments as shall have been levied. But members initiated after July 1, 1892, shall only pay one assessment per month during the first six consecutive months, and not exceeding two assessments per month during the next eighteen consecutive months, of membership. A member failing to pay any assessment required by law shall stand suspended, and shall not thereafter be entitled to the benefits of the widow and orphans' benefit fund until he has been duly reinstated in his subordinate lodge in accordance with the laws of the order."

As will have been seen, the effect of these amendments was to substitute new methods of assessment, and of giving notice of the same, as a prerequisite to suspension and consequent loss of rights in the benefit fund. Instead of receiving notice, written or printed, from the reporters of the subordinate lodges, of assessments, in case they exceeded or were less than two each month, lodges, at their option, were authorized to provide for notification by either written or printed notice, or through a designated newspaper, to be mailed or personally delivered to the members; and it was expressly provided that no failure on the part of the lodge to give notice, or failure to receive, should relieve members from the operation of another by-law, which prescribed absolute and unqualified suspension if assessments were not paid within the month. This was a radical and very serious departure from the previously existing by-law. It not only authorized the subordinate lodges, at their option, to do away with written or printed notices of assessments, and to substitute an entirely different method, by causing notice to be published in a designated newspaper; but, in terms, it declared that the failure of a lodge to give, and a failure of a member to receive, notice, should not operate to relieve members

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from the consequences of an omission to pay. They would stand suspended anyhow. If they neglected to pay all assessments, their rights were gone. No notice was required to work forfeitures, and there was no provision under which members could have a hearing.

It is possible that, as an original by-law, a provision of this character would be held reasonable and operative on the ground that, if persons chose to become members of an association with such drastic rules, theirs was the right so to do. But this was not the by-law when Thibert united with his lodge. The question is not as to the reasonableness of a by-law in force when he cast his fortunes with the order, but it is as to the reasonableness of a change in a by-law after he became a member, and of which it was not shown that he had any personal knowledge. In fact, it has been held that provisions for forfeitures in the original by-laws of mutual benefit societies, without providing for notice, or giving an opportunity to be heard, are void because unreasonable. 1 Bacon, Ben. Soc. § 85, and cases cited. But if the proposition that such a sweeping change as that attempted by defendant in 1893 as to notice of assessments can be upheld, and the rights, which have become vested and valuable, of those who have previously become members, be taken away through such a forfeiture, these associations should no longer be called benevolent, for they may easily become oppressive. They may cease to be of pecuniary service to those who, because of the death of the wage earner of the family, need aid and assistance, and become nothing but a trap into which members may pay their assessments for years, and at last have everything confiscated through the action of the lawmaking body.

The rights of members in these associations must, of course, depend upon the articles or by-laws, to which all members assent when becoming such; and, generally speaking, the same body which is authorized to make by-laws can change, amend, or repeal those already made; and to this Thibert agreed when he joined. But changes, amendments, and repeals are subject to the restrictions and limitations of the by-laws themselves, as well as those of the charter or articles of association, and are also subject to the implied condition of being reasonable. 1 Bacon, Ben. Soc. § 91a, and citations. The amendments and changes in 1893 took away the

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right which members had under the laws of 1891, to notice of monthly assessments, should they exceed or be less than two, and imposed upon each member the duty of taking notice himself of the number. He could not even pay two assessments, in the absence of notice, and protect himself. It conferred upon each subordinate lodge the power to provide, at its option, for notice to each member, and then wiped out the effect and benefit of an exercise of this power by declaring that a failure to give the notice agreed upon should not operate to relieve a member from his positive obligation to pay. If a member received the notice, and did not pay, he stood suspended, and had forfeited his rights, unless reinstated. If he did not receive the notice, and failed to pay, he was in the same predicament. The value of the publication of such a notice in a newspaper, except to its publisher, is not strikingly apparent.

We are compelled to hold that a change or amendment to the by-law in force when Thibert entered the association, whereby it was incumbent upon the reporter of his lodge to give him notice of assessments, if for a greater or less number than two, which deprived him of all right to any notice, either directly or indirectly, by means of a provision rendering a failure to give notice as determined upon by his lodge wholly immaterial, was a vitally important change, and, as to him, unreasonable and void. Nor is the reasonableness or unreasonableness of this change affected by the fact, if it was a fact, that his lodge had designated a newspaper in which notices were to be published, and copies mailed to each member. This was a radical and unreasonable change in the method of giving notice, which, according to the previously existing rule, was to be given by the lodge reporter. We are quite confident that no member who had been receiving and relying upon this form of notice would suppose, upon receiving such a paper, that this method of notifying had been substituted for the other.

But it does not follow that Thibert was not in default, and a suspended member, when he died. At the trial the reporter of his lodge testified that he met Thibert at Chippewa Falls about the middle of October, and then and there personally notified him of the assessment and levy in question, and also that the amount thereof

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must be paid on or before the last day of that month, and further testified that Thibert then promised to pay said amount before he left the town to go into the woods, where he had employment. The lawmaking body of this defendant corporation had wiped out the by-law under which notice had previously been required and had been given, so that it was no longer to be followed. And probably it would have had the power to substitute in place thereof the kind of notice which was given, if the testimony of the reporter was entitled to credit. Such a substituted by-law would, we think, have been reasonable and operative as to all members. So, if the lodge reporter was truthful, Thibert had actual notice of the three assessments.

A majority of the court are of the opinion that this notice, if given, and he accepted it as sufficient by promising to pay, was sufficient, and also that he would have a reasonable time thereafter within which to pay. If the notice was actually given, and about the middle of the month, as testified to by the witness, a reasonable time had certainly elapsed before his death on November 19. If this notice was given to Thibert, his widow could not recover upon this certificate, for he stood suspended at the time of his death. The writer takes occasion to say that he does not assent to the proposition that the reporter, or any other officer of the subordinate lodge or of the defendant corporation, could put Thibert in default by any other kind of notice than that required by the law of 1891. If the amendments of 1893 were unreasonable, and consequently of no effect as to Thibert, he could not, in the opinion of the writer, be put in default by verbal notice. He continued to be entitled to the notice provided for by the 1891 by-law, for as to him that law remained in force. But, in any event, the question whether the reporter gave the notice testified to was for the jury; taking into consideration, as we must, that Thibert, who alone could deny the conversation, was dead, and could not be heard. We must not be understood as saying that, in all cases where one of the parties to a conversation is deceased, the truthfulness of a version of the living as to what was said between them is for the jury. But in this case we think it was.

There is nothing whatsoever in the claim of counsel for plaintiff

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that the effect of the payment by Gregoire, the day before Thibert died, was to reinstate him.

The order stands affirmed.

It is further ordered that plaintiff's appeal from that part of the order of July 11, 1899, which set aside the verdict and granted a new trial, be, and hereby is, dismissed.

JOHN KOSTUCH v. ST. PAUL CITY RAILWAY COMPANY.

December 20, 1899.

78 459
88 77

Nos. 11,884—(165).

Charge to Jury.

If the charge of a trial judge, taken as a whole, fairly lays down the law of the case, the failure to state or give some abstract legal proposition or definition applicable thereto, in the technical language of the law, will not, in the absence of a special request, be prejudicial error.

Verdict Sustained by Evidence.

Evidence *held* to justify the verdict.

Action in the district court for Ramsey county to recover $4,145 damages for injuries to plaintiff's person and to his horse and wagon. The case was tried before Brill, J., and a jury, which rendered a verdict in favor of plaintiff for $700; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Munn & Thygeson, for appellant.

Humphrey Barton, for respondent.

BROWN, J.

This is an appeal from an order denying defendant's motion for a new trial after verdict in plaintiff's favor for $700. The action is one to recover damages for injuries to plaintiff's person and the destruction of his wagon, caused by being struck by a car operated by defendant, and, the complaint charges, by reason of the negligent and careless operation of such car. There are six assignments of error, but they embody but four principal questions. It is con-

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tended by counsel for appellants (1) that the evidence is insufficient to establish negligence on the part of defendant; (2) that it conclusively appears from the evidence that the plaintiff was guilty of contributory negligence; (3) that the court erred in permitting witness Dr. Odendahl to give in evidence declarations of plaintiff as to his physical condition; and (4) that the court erred in its charge to the jury.

1. We have thoroughly examined and considered the evidence, and all that appellant's counsel have said on the subject, and reach the conclusion that a case was made for the jury on the question of defendant's negligence, as well as of plaintiff's contributory negligence. We regard the evidence tending to show contributory negligence on the part of plaintiff as quite strong, but in view of the fact that the collision resulting in plaintiff's injuries occurred at a point where cars on this line usually come to a stop to take on passengers, the further fact that persons were there waiting for the car at the time, coupled with the testimony of plaintiff that it was at least half a block away when he started to cross the track, we cannot see our way clear to declare, as a matter of law, that plaintiff was guilty of contributory negligence.

2. The question as to the admissibility of the testimony of witness Dr. Odendahl is disposed of by the decision in the case of Edlund v. St. Paul City Ry. Co., supra, page 434.

3. The court below charged the jury that the plaintiff was guilty of contributory negligence unless he exercised reasonable care; "that is, such care as men ordinarily exercise under similar circumstances." To this, defendant excepted; and it is urged here that it was an erroneous statement of the law, and is fatal to the verdict. The objection to the charge is the omission of the qualifying word "prudent" before the word "men." The merits of this exception are too far removed from that which is substantial to justify its being made the basis of a reversal of the order appealed from. The definition of contributory negligence was not given by the learned court below in the usual technical language, but, taking the entire charge together, the subject was sufficiently covered. A trial judge is not required to measure the words and sentences employed in his charge to a jury, and if, taken as a whole, the charge, as given,

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fairly lays down the law applicable to the questions to be determined by the jury, it is sufficient, although some abstract legal proposition or definition be not stated or given in the technical language of the law. The precise point made against this instruction was not called to the attention of the court below at the trial.

Order affirmed.

NICHOLS & SHEPARD COMPANY v. L. S. HACKNEY and Another.

78 461
80 523

January 12, 1900.

Nos. 11,892—(187).

Principal and Agent—Agreement to Accept Note of Third Person.

An agreement by a general agent, who possesses full power and authority to make collections and settlements of debts due his principal, entered into with a debtor of the principal, to accept and receive the promissory note of a third person in payment of an indebtedness due the principal from such debtor, is valid, and will bind the principal, if founded on a valuable consideration.

Verdict.

If a verdict of a jury can be sustained on any proper and consistent theory of the evidence, it is the duty of the court, in the absence of some prejudicial error in law, to sustain it, and refuse a new trial.

Verdict Sustained by Evidence.

Evidence considered, and *held* to sustain the verdict.

Action in the district court for Watonwan county to recover $951.91 with interest on three promissory notes. The case was tried before Severance, J., and a jury. At the close of the testimony the court granted the motion of plaintiff to dismiss the action as to defendant Weymouth, and the jury rendered a verdict in favor of defendant Hackney. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

A. E. Clark, for appellant.

Ashley Coffman and *W. S. Hammond*, for respondents.

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BROWN, J.

The complaint in this action contains three causes of action, based upon three promissory notes heretofore made and delivered to plaintiff by defendants. The answer admits the making and delivery of the notes, and alleges, in defense—First, that all the notes have been paid; and, second, that those mentioned in the first and second causes of action are barred by the statute of limitations. The notes were given by defendants in payment for a thresher outfit purchased of plaintiff at about the time they were so given. At the trial in the court below plaintiff dismissed the action as to defendant Weymouth, defendant Hackney had a verdict, and plaintiff appeals from an order denying a new trial.

In support of the defense of payment, defendants introduced evidence tending to show that some time after the purchase of the thresher outfit, which consisted of a steam engine and separator, and after one or more of the notes given therefor had become due, they made and entered into an agreement with plaintiff by which they were to sell the outfit to some third person, and turn the notes to be received therefor over to plaintiff, which plaintiff agreed to accept and receive in payment, pro tanto, at their face value, of the notes in suit; that, under and pursuant to this agreement, they sold the engine belonging to said outfit to the firm of Edwards & Carlile for the sum of $1,050, and delivered the notes received in payment to the plaintiff. Such notes were made payable to the plaintiff, and plaintiff has at all times since retained the same. It is insisted by defendants that plaintiff accepted the same in payment of their notes, pursuant to such agreement. The plaintiff denies this, and insists that such notes were delivered to, and accepted by, it as collateral security only. The aggregate amount of the Edwards & Carlile notes, and the subsequent payments made by defendants, exceeds the total amount due on the notes in suit.

This defense of payment extended to all the notes mentioned in the complaint, while the defense of the statute of limitations extended to the first two only. The jury returned a general verdict for defendant Hackney, and must necessarily have founded it upon the defense of payment. They thus found that plaintiff accepted

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the Edwards & Carlile notes in payment, and not as collateral security. No other finding could have resulted in a general verdict for defendants, and such a verdict could not have been returned without such a finding. The questions pertaining to the second defense are not, therefore, important, and need not be considered. The only question there involved, and the only one submitted to the jury by the trial court, was whether defendants made certain payments to plaintiff to be applied on the first and second causes of action, and thus interrupted the running of the statute of limitations; and in view of the fact, which conclusively appears from the record, that the jury found that all the notes have been paid in full, it becomes immaterial whether the disputed payments were made or not. A finding that they were or were not made would in no way affect the result as arrived at by the jury. The notes having been paid in full, there was nothing for the statute of limitations to act upon.

If a verdict of a jury can be sustained on any proper and consistent theory of the evidence, it is the duty of the court to sustain it, and refuse a new trial, unless the record presents some error in law of sufficient importance to justify setting it aside. We may say, in passing, that we find no such error in the record in this case, either in the rulings of the court on the admission of evidence, or in the charge to the jury or refusals to charge. If this verdict is sustained by the evidence, therefore, the order appealed from must be affirmed. And the important question in the case is whether it is thus sustained. The evidence on the subject is conflicting, with circumstances corroborating both parties. We have examined and considered it thoroughly, and reach the conclusion that it is sufficient to sustain the verdict. While some of us might not have viewed the evidence in the same light the jury did, had the question been submitted to us as an original proposition, yet we cannot see our way clear to disturb the verdict, approved, as it has been, by the learned trial judge.

The agreement under which defendants claim that plaintiff accepted the Edwards & Carlile notes in payment was made with J. L. Gable, the general agent of plaintiff. There can be no question as to his authority to enter into the agreement. It clearly appears

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that he was the general agent and manager of plaintiff, and had full charge of its business affairs in this state, with full authority to make settlements with plaintiff's debtors. An agreement by such an agent, founded on a sufficient consideration, to accept and receive the promissory notes of a third person in payment of a debt due the principal, is valid, and the principal is bound thereby. The consideration for this agreement was ample. The defendants parted with the title to the engine, and delivered plaintiff the notes received in payment therefor.

Order affirmed.

STATE ex rel. J. D. LEARY and Another v. DISTRICT COURT OF MOWER COUNTY.

January 12, 1900.

Nos. 11,963—(221).

Appeal—Order Dissolving Injunction.

An appeal from an order dissolving a temporary writ of injunction, if a proper supersedeas bond be given, operates to revive and continue the writ in force pending the appeal. State v. Duluth St. Ry. Co., 47 Minn. 369, followed.

Same—Additional Parties Defendant—New Bond.

In actions where a writ of injunction has been allowed and issued, and subsequent to the issuance of the writ third persons are, by order of the court, brought in, and made parties defendant, the failure of the court to require a new bond to be given, running to the new defendants, is, at most, but an irregularity, which can only be taken advantage of by motion to dissolve the writ. Upon being served with such writ of injunction, the new defendants become bound thereby, and must obey its commands.

Writ of certiorari issued out of the supreme court to review an order of the district court for Mower county, Kingsley, J., adjudging relators guilty of contempt. Writ quashed.

J. M. Greenman, R. J. Dowdall, and *Russell, Cray & Jamison,* for relators.

Lafayette French, for respondent.

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BROWN, J.

In proceedings in the court below, relators were adjudged guilty of contempt of court for the violation of a temporary writ of injunction, and bring such proceedings before this court for review by writ of certiorari.

On October 20, 1899, an action was commenced in the district court of said Mower county by the Austin Electric Company, a corporation, against the city of Austin, and the mayor, recorder, and treasurer thereof, to enjoin and restrain the city from carrying out certain contracts it had made for the construction and equipment of an electric light plant, and from paying therefor. Upon the presentation of the summons and complaint in such action, the district court of such county, on application of plaintiff therein, duly ordered that a temporary writ of injunction issue as prayed for in the complaint. Pursuant to this order, a temporary writ was issued restraining and enjoining the defendant city, its officers and agents, from doing the threatened acts, "until the further order of this court." Prior to the issuance of the writ the usual bond was executed, approved, and filed as required by law. On October 23, 1899, and before any of the defendants had appeared in the action, the court, on application of the plaintiff, made an order making the relators herein, W. I. Gray and the Twin City Iron Works, parties defendant in the action. All papers and proceedings in the action, with the exception of the bond, were amended accordingly, and subsequently served upon the new parties. Thereafter all the defendants appeared, answered jointly, denying the equities of the complaint, and upon the complaint and such answer moved the court for an order dissolving the temporary injunction. The court made an order granting the motion, and plaintiff appealed therefrom to this court, filing a proper supersedeas bond. Notwithstanding such appeal, the relators proceeded with the work prohibited and enjoined by the temporary writ, and in proper proceedings they were adjudged guilty of contempt of court, and sentenced to pay a fine. To review such contempt proceedings they sued out this writ of certiorari.

It is claimed in their behalf that the order adjudging them guilty of contempt of court was erroneous for the reasons: (1) That the

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temporary writ of injunction was absolutely terminated by the order dissolving it, and was not in force at the time the acts complained of were committed; (2) that plaintiff permitted and allowed the writ to terminate by failing to procure from the court below an order staying proceedings on the order dissolving it until an appeal therefrom was perfected; and (3) that the writ was at no time in force as to them, because no new bond was filed after they had been made defendants in the action, and as to them there was no bond at all.

1. The majority of the court are of the opinion that the question whether the writ of injunction was revived and continued in force by the appeal from the order dissolving it is the same as that presented in the case of State v. Duluth St. Ry. Co., 47 Minn. 369, 50 N. W. 332, and that this case, in so far as that question is concerned, is controlled by that decision. A majority of the court are also of the opinion that the decision in that case is unsound, and has had the effect of driving the temporary writ of injunction out of use in this state, and to substitute in its place a temporary restraining order, between which there is no logical distinction, but that, out of respect for the rule of stare decisis, it should be followed and adhered to.

The contention on the part of the relators is that the writ involved in the Duluth case is essentially different from the one involved in this case, and that the decision there made has no application here. The writ issued in this case restrains the defendants "until the further order of this court," but this limitation does not appear in the writ in the Duluth case. And herein lies the distinction contended for by relators. We hold that there is no substantial difference between the writs, and that the cases cannot, in sound logic or reason, be distinguished. It is not important whether a temporary writ of injunction in form restrains defendant from doing the threatened act until the further order of the court, or during the pendency of the action, or whether both expressions be omitted therefrom. By operation of law such a writ continues in force from the time of its issuance until the court makes some further order with respect thereto, and this whether the writ expressly so provides or not. It is usual, however, for a

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temporary writ to contain express words of limitation, as in this case. 1 Beach, Inj. 109.

2. The failure to procure from the court below an order staying proceedings on the order dissolving the writ of injunction until an appeal therefrom could be perfected is not deemed of any importance. The acts committed by relators for which they were adjudged in contempt were committed after the appeal had been perfected. Relators' position would be quite different had such acts been committed prior to the appeal. Plaintiff had 30 days in which to perfect his appeal, and the writ was revived and continued from the date the appeal was so perfected. See, as bearing on this point, Ryan Drug Co. v. Peacock, 40 Minn. 470, 42 N. W. 298.

3. At the time relators were made parties to the action, the court did not require plaintiff to file a new or additional bond running to the new defendants, and relators claim that, for the want of such new bond, the writ never became operative as to them. The position is not sound. Counsel for relators do not seriously contend that it is. If the court should have required a new bond, the failure to do so was but an irregularity in no way affecting the validity of the writ, and which could only be taken advantage of by motion to dissolve the same. State v. Jamison, 69 Minn. 427, 72 N. W. 451; State v. District Court of Hennepin Co., 71 Minn. 383, 73 N. W. 1092. Perhaps a new bond should have been required. The relators' remedy for the failure to require it, however, was by motion, and not by a violation of its commands. Our conclusion is that the order adjudging relators guilty of contempt of court was in accordance with law, and should be sustained.

The writ of certiorari is therefore quashed, and the cause remanded to the court below for further proceedings. So ordered.

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WILLIAM HEIN v. EARL HOLDRIDGE.

January 18, 1900.

Nos. 11,756—(52).

Seduction.

In a civil action by a father for the seduction of his daughter, *held*:

Charge to Jury.

That it was not error for the trial court to refuse to instruct the jury that, to entitle the plaintiff to recover any damages beyond his actual money loss, it must appear that the debauchment of his daughter was accomplished by seductive arts.

Evidence of Reputation for Chastity.

That the court did err in excluding evidence offered by the defendant to show that his general reputation for chastity was good. Schuek v. Hagar, 24 Minn. 339, followed.

Action in the district court for Olmsted county to recover $5,031.50 damages for seduction of plaintiff's daughter. The case was tried before Snow, J., and a jury, which rendered a verdict in favor of plaintiff for $531; and from an order denying a motion for a new trial, defendant appealed. Reversed.

James E. Bradford and *Webber & Lees*, for appellant.

The action is statutory, and the statute should be given an interpretation consonant with the ordinary signification of language. The word "seduce," in this connection, is universally understood to imply enticement by some art, influence, promise, or deception. State v. Bierce, 27 Conn. 319; Croghan v. State, 22 Wis. 444; Abbott, Law Dict. "Seduction"; Hill's Code (Ore.) §§ 35, 36; Code Civ. Proc. (Cal.) § 375; Patterson v. Hayden, 17 Ore. 238. While seducing may include debauching, the injuries are distinct, and the rules of damages different. Only in cases of debauching with seduction are exemplary damages allowable. Smith v. Young, 26 Mo. App. 575; Hartman v. McCrary, 59 Mo. App. 571; McAulay v. Birkhead, 13 Ired. 28; Comer v. Taylor, 82 Mo. 341, 346; Grable v. Margrave, 3 Scam. 372; Rea v. Tucker, 51 Ill. 110; Morgan v. Ross, 74 Mo. 318.

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Where there has been no seduction, recovery cannot be had by the father beyond loss of services and incidental expenses. 2 Sedgwick, Dam. 518; Simpson v. Grayson, 54 Ark. 404; Comer v. Taylor, supra; Hill v. Wilson, 8 Blackf. 123. See Bell v. Rinker, 29 Ind. 267; Wood v. State, 48 Ga. 192.

Evidence of defendant's reputation for chastity and good moral character was admissible. Schuek v. Hagar, 24 Minn. 339; Bingham v. Bernard, 36 Minn. 114. Fonda v. St. Paul C. Ry. Co., 71 Minn. 438, is distinguishable, since the motorman was not charged with a crime involving moral delinquency. Townsend v. Graves, 3 Paige, Ch. 453.

H. A. Eckholdt, for respondent.

It is not essential that the act was accomplished by seductive arts. Russell v. Chambers, 31 Minn. 54; Kennedy v. Shea, 110 Mass. 147; Lavery v. Crooke, 52 Wis. 612; Barbour v. Stephenson, 32 Fed. 66; White v. Murtland, 71 Ill. 250; Leucker v. Steileu, 89 Ill. 545; Fox v. Stevens, 13 Minn. 252 (272); Furman v. Applegate, 23 N. J. L. 28, 30; Marshall v. Taylor, 98 Cal. 55; Dalman v. Koning, 54 Mich. 320; Lawrence v. Spence, 99 N. Y. 669; Reed v. Williams, 5 Sneed, 580.

Defendant's character was not put in issue, nor impeached. Until attacked, he must rely on the general presumption of good character. Cochran v. Toher, 14 Minn. 293 (385); Lotto v. Davenport, 50 Minn. 99. Schuek v. Hagar, 24 Minn. 339, is contrary to the overwhelming weight of authority elsewhere, and should not be followed. 1 Jones, Ev. §§ 147–156; 3 Am. & Eng. Enc., 861, et seq.; Delvee v. Boardman, 20 Iowa, 446; McKern v. Calvert, 59 Mo. 243; Watson v. Watson, 53 Mich. 168; McAulay v. Birkhead, 13 Ired. 28; Pratt v. Andrews, 4 N. Y. 493. Schuek v. Hagar, supra, was not the law of this state when decided. Cochran v. Toher, supra. It has since been ignored by this court. Lotto v. Davenport, supra; Fonda v. St. Paul City Ry. Co., 71 Minn. 438. A party to a civil action can give evidence of good character only in answer to impeaching evidence. As to slander this rule applies. Hitchcock v. Moore, 70 Mich. 112; Rhodes v. Ijames, 7 Ala. 574; Miles v. Vanhorn, 17 Ind. 245; Cooper v. Phipps, 24 Ore. 357. Lotto v.

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Davenport, supra. So in false imprisonment. Diers v. Mallon, 46 Neb. 121; Cochran v. Toher, supra. And in malicious prosecution. Fire Assn. v. Fleming, 78 Ga. 733. And in assault. Fahey v. Crotty, 63 Mich. 383. The same presumption applies to the character of the daughter seduced. Barbour v. Stephenson, supra; Cooper v. Phipps, supra; 5 Am. & Eng. Enc. 861, note 2; Id. (2d Ed.) 852, note 4.

Consent of the daughter is no defense. Barbour v. Stephenson, supra; McAulay v. Birkhead, supra.

START, C. J.

This is an action by a father for the alleged seduction of his daughter by the defendant. Verdict for the plaintiff in the sum of $531, and the defendant appealed from an order denying his motion for a new trial. The assignments of error present two general questions for our decision. They are:

1. Did the trial court err in refusing the defendant's request to instruct the jury that, to justify a verdict for the plaintiff, it must appear that the alleged debauching of his daughter was accomplished by some act, influence, promise, or deception naturally calculated to mislead a virtuous woman, and in instructing them that if the daughter was a virgin, and the defendant deflowered her, the plaintiff was entitled to a verdict? The evidence was such as to require the giving of the requested instruction, if it was a correct statement of the law as applied to a civil action by the father for the seduction of his daughter.

The contention of the defendant, briefly stated, is that this action is one given by statute (G. S. 1894, § 5163), and that the word "seduction," as therein used, is to be taken in the technical and limited sense in which it is used in penal statutes. This is not strictly a statutory action. It is a common-law action modified by statute. The only change made by the statute is to dispense with the necessity of proving loss of service,—a fiction invented to enable the father to recover damages for the shame and suffering brought upon him and his household by the debauching of his daughter. The injury to the father is, as stated by the learned trial judge:

"Not only * * * his subjection to material loss and ex-

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pense, but it is the degradation of his daughter, and the consequent dishonor of himself and family. It is the conversion of the chaste child of his loins into what the world deems an unclean thing. It is a wounding of his paternal pride, and a forcing of grief and shame into his home and domestic circle. On principle, what matters it by what particular means this wrong was inflicted?"

Our statute, while dispensing with the fiction as to the loss of services by the father, uses the word "seduction," not in the sense in which it is used in penal statutes, but in the same sense as it was used in common-law actions by a father for the seduction of his daughter. In such actions "seduction" and "debauching" were used as substantially similar terms, and it was not important which word was used in the declaration. Nor were the special circumstances of the daughter's debauchment material to the father's cause of action, except as to the amount of his recovery. The adjudged cases are not uniform on the question here under consideration. But upon principle and authority we hold that, in an action under our statute by the father for the seduction of his daughter, it is not necessary to show that her debauchment was accomplished by seductive arts, in order to entitle him to damages, including those which are exemplary, in excess of his actual pecuniary loss. The age of the daughter, and the circumstances under which she was debauched, may aggravate or mitigate the damages to be awarded; but they do not afford any basis for limiting, as a matter of law, the father's damages to his actual money loss. Fox v. Stevens, 13 Minn. 252 (272); Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696; McAulay v. Birkhead, 13 Ired. 28; Kennedy v. Shea, 110 Mass. 147; Barbour v. Stephenson, 32 Fed. 66; Lawrence v. Spence, 99 N. Y. 669, 670, 2 N. E. 145; White v. Murtland, 71 Ill. 250.

It follows that the trial court rightly refused the defendant's requested instruction, and correctly instructed the jury.

2. Did the trial court err in excluding evidence offered by the defendant to show that his general reputation for chastity was good? The only evidence as to the alleged acts of sexual intercourse between the defendant and the plaintiff's daughter was the testimony of the daughter and of the defendant. They flatly contradicted each other. The daughter, who was at that time a serv-

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ant in the family of the defendant, testified to such acts, and that the defendant was the father of her illegitimate child. The defendant, who was a married man, positively denied her testimony. Thereupon the defendant offered to show, by witnesses who had known him from his birth, and lived near him, that his general reputation for chastity was good. The court excluded the evidence, and the defendant duly excepted. Was the ruling correct?

The charge against the defendant involved the commission of a crime by him, and, if this were a criminal case, it is certain that the excluded evidence would have been admissible. The accused in a criminal case, whether the charge be a felony or misdemeanor, may always prove his previous good character, of which his general reputation is evidence, as tending to disprove the commission of the offense; that is, as tending to show the improbability of a person of his previous character committing the act charged. The rule is not limited to cases where the probative force of the evidence against the accused is weak. There would seem to be no logical reason why the same rule should not apply to civil actions in which the defendant is charged with a crime. But the accepted general rule is that evidence of the general character of parties to civil actions, where character is not a part of the issue, is inadmissible. The rule seems to be one of practical convenience, for the purpose of avoiding the confusion of issues. 1 Greenleaf, Ev. (16th Ed.) § 14b, subd. 4. On principle, however, it would seem that there ought to be exceptions to this general rule. In this state, whatever may be the case in other jurisdictions, such exceptions are recognized.

Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character; or, in other words, such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases. Civil actions for an indecent assault, for seduction, and kindred cases, are of this character; for such cases are not infrequently mere speculative and blackmailing schemes. The consequences to the

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defendant of a verdict against him in such a case are most serious, for the issue as to him involves his fortune, his honor, his family. From the very nature of the charge, it often happens that an innocent man can only meet the issue by a denial of the charge, and proof of his previous good character. Ought a defendant in such a case to be deprived of the right to lay before the jury evidence of his previous good character, because it will tend to confuse the issue, while a defendant in a case where the state charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? The question has been answered in the negative by this court. If evidence of the previous good character of a defendant is admissible in a civil action for an indecent assault, it necessarily follows that such evidence is admissible in a civil action for seduction, for the cases in this respect cannot be distinguished.

Now, in the case of Schuek v. Hagar, 24 Minn. 339, which was a civil action to recover damages for an indecent assault, the defendant offered evidence of his previous good character; and this court, reversing the trial court, held, without dissent, that such evidence was admissible. In the case of Bingham v. Bernard, 36 Minn. 114, 30 N. W. 404, which was a similar action, it was assumed by court and counsel that the rule of Schuek v. Hagar was correct, and evidence of defendant's good character was received without objection. If the doctrine of Schuek v. Hagar is to be adhered to, it necessarily follows that it is decisive of the question we are now considering, and that it was reversible error for the trial court to exclude the offered evidence.

But we are asked to overrule that case for the reason that it is opposed to the great weight of judicial opinion outside of our own state. That such is the case must be conceded. It is not, however, necessarily a reason for overruling the case. It has remained unchallenged for more than 22 years, and there is no reason to believe that it has not, in actual practice, proven a benefit, and not a hindrance, in the administration of justice in cases of the character suggested, and others where the alleged cause of action involved a charge of felony against the defendant. It therefore ought to be

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adhered to on the ground of stare decisis, if for no other, and we so hold. We are also of the opinion that the doctrine of that case ought not to be extended to civil actions where the issue relates to a simple assault, or to the fraud, deceit, or negligence of the defendant, or to similar actions, for they are not within the reasons we have suggested for the admission of evidence of good character in exceptional civil actions. Our conclusion is that the trial court erred in ruling out the proffered evidence.

Order reversed, and a new trial granted.

COLLINS, J.

The universal rule is that the character of a party to a civil action is not admissible in evidence as tending to prove that he did not do the act in question. The nature of every transaction involved in such an action is to be determined by its own facts and circumstances, and not by the character of the parties. But this rule was departed from by this court, in 1877, in Schuek v. Hagar, 24 Minn. 339. And, to be consistent, the doctrine of that case should be applied whenever the charge made in a civil action imputes any kind of moral turpitude to a defendant, such as fraud or falsehood or kindred delinquencies; for, whenever the character of a defendant for fraudulent or deceitful practices or for truth or honesty is at issue, he, for the same reasons exactly, ought to be permitted to lay before the jury evidence of his previous good character, as tending to show that he was not morally delinquent, and not inclined to fraud or falsehood. This would be a departure from the well-settled rules of evidence not to be thought of, and yet, on principle, not a step in advance of, or materially different from, that laid down, without discussion and without citation of authority, in the Schuek case. I am convinced that the court was radically wrong in that case. But on the ground of stare decisis I concur in the main opinion. I am authorized to say that Justice BROWN coincides with these views.

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A. E. HERRICK and Others v. G. S. BARNES.

January 18, 1900.

Nos. 11,851—(169).

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Dismissal of Action.

A trial court, whether the trial be with or without a jury, cannot rightly dismiss the action, without a verdict or findings of fact, on the ground that the plaintiff has failed to establish a cause of action, unless the evidence is such that it would not sustain a verdict or finding for the plaintiff.

Conversion of Wheat—Storage Receipts—Evidence.

Rule applied and evidence considered in an action by the holder of storage receipts for wheat, issued by a warehouseman, against a purchaser of the wheat from the warehouseman, for its conversion, and *held*: (1) That it was error for the trial court to dismiss the action without making findings of fact. (2) That the evidence would have sustained a finding to the effect that the title to the wheat in question was in the plaintiffs, and that it did not require, as a matter of law, a finding that they consented to the sale of the wheat to the defendant, and received the purchase price therefor. (3) That, if the storage receipts were intended by the parties thereto to cover the wheat actually in store, a misdescription of the grade thereof in the receipts would not, as between the parties, affect the title of the holder of the receipts to the wheat.

Appeal by plaintiffs from a judgment of the district court for Hennepin county dismissing the action, entered pursuant to the order of Harrison, J. Reversed.

Wallace & Belden and *C. A. Willard*, for appellants.

Webster & Potter, for respondent.

START, C. J.

1. The plaintiffs seek by this action to recover from the defendant $2,096.27, the value of their special property and interest in 4,000 bushels of wheat, alleged to have been converted by him. The cause was tried by the district court of the county of Hennepin without a jury, and at the close of the evidence the defendant moved the court to dismiss the action. Thereupon the court, without making any findings of fact, granted the motion, and a judg-

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ment dismissing the action was entered, from which the plaintiffs appealed.

A trial court, whether the trial be with or without a jury, cannot rightly dismiss an action, without a verdict or findings of fact, on the ground that the plaintiff has failed to establish a cause of action, unless the evidence is such that it would not sustain a verdict or finding for the plaintiff. It is not sufficient that the evidence would sustain a verdict or finding for the defendant. It must be such as to require, as a matter of law, a verdict or finding against the plaintiff. Tharalson v. Wyman, 58 Minn. 233, 59 N. W. 1009. It therefore follows that the court erred in so dismissing this action, unless the evidence, as a matter of law, required such a finding. The defendant here claims that such is this case. His claims, briefly stated, are: (a) The evidence shows that the plaintiffs never had any title to or interest in the wheat in question. (b) The evidence conclusively shows that the wheat claimed by the plaintiffs was sold to the defendant with their consent and authority, and that they received the full purchase price thereof. Of these in order.

2. The evidence as to the plaintiffs' title to the wheat tended to show these facts: The plaintiffs, here designated as the "bank," were bankers doing business under the name of Eden Valley Bank, at Eden Valley, this state, and Messrs. Harris & Hukriede, here referred to as the "warehousemen," were engaged at the same place, during the times hereinafter stated, in operating a public warehouse or grain elevator. In August, 1897, they made an agreement with the bank, whereby the latter was to discount for them their drafts drawn by them on purchasers of wheat from them. They continued from this time until November 23, 1897, in the business of buying, storing, shipping, and selling grain, during which time they purchased wheat on their own account, storing it in their warehouse, and when they shipped it out they would draw drafts on the consignees, and place the drafts in the bank for collection. The drafts were placed to their credit, and they were allowed to check against such credits before it was known whether the drafts would be accepted or paid.

October 7 a draft of $1,000, so drawn and credited, was dishon-

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ored, which left their account overdrawn. Thereupon the cashier of the bank went to the warehouse, and asked for security, and it was then agreed between the bank and the warehousemen that they should give the bank security on wheat in the warehouse to protect its account, and they accordingly issued to and delivered to the bank a storage ticket or receipt in the usual form for 2,000 bushels of No. 1 Northern wheat. On October 26 their account with the bank was overdrawn in the sum of $2,056.06, and the cashier called upon them for further security, and they issued to the bank another and similar storage receipt for 2,000 bushels more of No. 1 Northern wheat for the same purpose as the first ticket was issued. At the time when each of these tickets was delivered the cashier examined the wheat in the warehouse, and each time found at least 4,000 bushels of wheat therein. The capacity of the warehouse was 10,000 bushels, and from the date of the first receipt (October 8) to November 23, 1897, when the warehousemen ceased to operate the warehouse, they purchased and placed therein and shipped therefrom wheat from time to time, so that on the day last named there remained no wheat in the warehouse. The last 4,000 bushels of wheat therein were shipped to and delivered to the defendant at the city of Minneapolis. At this time their account with the bank, by reason of dishonored drafts, which the bank had discounted, and overdrafts, was overdrawn $2,096.27. There was no No. 1 Northern wheat, according to the grade given it at Minneapolis, in the warehouse between the date of the first receipt and the time when all of the wheat remaining in the warehouse was shipped to the defendant, but the wheat intended to be covered by the receipts by the parties hereto was the wheat in the warehouse at the times they were respectively issued. There was no evidence that there were any outstanding receipts for wheat in the warehouse except those belonging to, and still retained by, the bank.

We are not prepared to hold that the evidence required a finding of all the foregoing facts, but do hold that, if the court had so found, the evidence would sustain it. Assuming, for the purposes of this appeal, the facts which the evidence tends to prove, the question for our decision is whether such facts establish the bank's title to the wheat so shipped out of the warehouse, and sold to the

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defendant. If the wheat in the warehouse had been in fact No. 1 Northern, the title to the last 4,000 bushels thereof shipped out of the warehouse would have been in the bank by virtue of the receipts. This proposition is thoroughly settled by the decisions of this court. National Ex. Bank v. Wilder, 34 Minn. 149, 24 N. W. 699; Eggers v. National Bank of Commerce, 40 Minn. 182, 41 N. W. 971; Hall v. Pillsbury, 43 Minn. 33, 44 N. W. 673. The defendant, however, claims that:

"The wheat described in these receipts had no existence in the hands of the warehousemen at the time they were issued, and none afterwards came into their possession. These contracts, therefore, had no validity, and conveyed no title, because the pledgor had no such property to pledge. * * * The proof shows, not only that defendant never received any such wheat as that pledged by the contract, but that such wheat never had any existence as the subject-matter of the contract."

If it be true, as claimed, that the evidence shows that the warehousemen in this case never had any such wheat as that pledged by them to the bank, it follows that the receipts were invalid, and conveyed no title to any wheat to the pledgee. But is it true that the warehousemen did not have in their warehouse the wheat pledged? The fact that when the wheat in the warehouse reached Minneapolis it did not grade No. 1 Northern, or that it was not, in fact, at any time or place, of such grade, does not justify a negative answer to the question, for the wheat in the warehouse when the receipts were given was the wheat pledged by the warehousemen, and intended to be covered by the receipts. The bank's rights, by virtue of its receipts, are precisely as if it had actually deposited the 4,000 bushels in the warehouse, and received the storage receipts therefor. National Ex. Bank v. Wilder. Now, if such had been this case, could it be claimed that the bank lost its title to the wheat, and that the warehousemen could sell it, and vest the title thereto in the purchaser, because they had mistakenly or otherwise misdescribed the grade of the wheat in the receipts? If so, depositors can be deprived of their wheat without any remedy, for it would only be necessary for the warehousemen to misdescribe the grade of the wheat in the storage receipt, and then sell all of the wheat in the warehouse to a third party. Such is not the law.

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If it be a fact in this case that the storage receipts were intended by the parties thereto to cover the actual wheat owned and held in store in their warehouse by the parties executing the receipts at the time they were issued, then, as between the parties, the misdescription of the grade is immaterial, and the title to the wheat then in the warehouse, to the extent of 4,000 bushels, vested in the bank. National Ex. Bank v. Wilder. The parties to the receipts, after they were issued, were tenants in common in the mass of wheat in the warehouse. The interest of the warehousemen in the mass was limited to the excess of wheat above what was necessary to meet the outstanding receipts. This excess they had a right to ship out and sell. As fast as the wheat was shipped out, and other wheat purchased and added to the common mass, the new wheat took the place of that originally deposited. The warehousemen in this case owned and had a right to ship and sell at all times all of the wheat in the warehouse in excess of 4,000 bushels, the amount called for by the storage receipts; but, when this limit was reached, they had no title to what remained, and could convey none to a purchaser thereof without the consent of the holder of the receipts. Hall v. Pillsbury.

It follows that the order of the trial court dismissing this action cannot be sustained on the ground that the evidence was not sufficient to sustain a finding that the plaintiffs had title to the wheat in question.

3. This brings us to the defendant's second claim. The evidence is not conclusive that the bank consented to the shipment and sale to the defendant of the last 4,000 bushels of wheat covered by the storage receipts, or that the bank received the purchase price therefor. The bank held the wheat covered by the receipts as a continuing security for the payment of any overdrafts by the warehousemen. Their account was overdrawn when they ceased to operate their warehouse and the receipts are still retained by the bank; hence there is no presumption that it consented to the sale of the wheat covered by the receipts. The burden, therefore, was upon the defendant to establish this alleged defense. It is true, as claimed, that the cashier, who had the exclusive management of the business of the bank, knew that wheat was being shipped from

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the warehouse, and sold to the defendant, and that he discounted drafts drawn on the defendant on account thereof; and, further, that he urged the warehousemen to ship out wheat, and reduce their account. But there was no direct evidence that the cashier knew that the wheat in the warehouse was being reduced below 4,000 bushels, and the circumstantial evidence on this point is not conclusive. On the contrary, he denied that he knew it, and there was evidence tending to show that the warehousemen told him that their warehouse was crowded with wheat, and that they had difficulty in getting cars in which to ship it.

Upon the whole record we hold that the trial court ought to have made findings as to the material issues in this case, and that it was error to dismiss the action without so doing.

Judgment reversed, and a new trial granted.

E. P. STACY and Others v. WILLIAM STEPHEN.

January 18, 1900.

Nos. 11,853—(188).

Garnishment—Supplemental Complaint.

To entitle a party to an order permitting the filing of a supplemental complaint under G. S. 1894, § 5319, he must make application therefor with reasonable diligence, and, if he neglects to do so for an unreasonable length of time, his application will be denied.

Renewal of Motion.

A motion cannot be renewed, where no new facts have arisen, without leave of court.

Action in the district court for St. Louis county against William Stephen, doing business as Central Mercantile Company, defendant, and W. D. Underhill, garnishee, to recover $247.54 for goods sold and delivered. From an order, Cant, J., denying a motion for leave to file a supplemental complaint making the garnishee a party, plaintiffs appealed. Affirmed.

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Austin N. McGindley, for appellants.
James A. Hanks, for garnishee respondent.
Eckman & Stevenson, for defendant respondent.

BROWN, J.

On August 30, 1898, the Central Mercantile Company, engaged in the commission business at Duluth as a corporation, made an assignment, under the insolvent laws of the state, for the equal benefit of all its creditors, to W. D. Underhill, garnishee and respondent in this cause. Due notice of the assignment was given to plaintiffs, who were creditors of the insolvent concern, and they duly appeared in the proceedings, and presented and filed their claim, together with a release thereof, executed in due form of law. On December 9, 1898, subsequent to the assignment and to the filing of such claim, plaintiffs commenced this action against William Stephen to recover upon the indebtedness so due from such corporation. The defendant is described in the summons and complaint, "William Stephen, doing business as Central Mercantile Company." Judgment was rendered against defendant on default January 19, 1899, for the sum of $267.14. Subsequent to the entry of the judgment, garnishee proceedings were instituted in the action, and said W. D. Underhill duly made garnishee. At the disclosure in February, 1899, the garnishee denied any indebtedness due defendant Stephen, but admitted that he had money and property in his hands belonging to the corporation. On the theory and claim that the corporation had no legal existence, and that the property in the hands of the garnishee in fact belonged to defendant Stephen, plaintiffs moved the court below for leave to file a supplemental complaint under G. S. 1894, § 5319, setting up such facts. The motion was denied on the merits, March 18, 1899, and no appeal was ever taken therefrom. Without obtaining leave of court to do so, plaintiffs, on August 4, 1899, again moved the court for leave to file such supplemental complaint, which was denied on August 19. The appeal under consideration is from this last order.

The motion was properly denied. A party to an action cannot be heard to make successive motions for the same relief. A motion once made and denied is final, and a bar to a second motion, except when the second motion is made by leave of court, or upon new

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facts arising subsequent to the first motion. No leave of court to renew this motion was asked for, or granted by the court, nor was it based upon any new facts. The first motion was based upon the ground that the Central Mercantile Company was not in fact a corporation, and that defendant Stephen was the owner of all the property in the hands of the assignee. The second motion was based upon the same ground. Plaintiffs may have discovered further evidence to substantiate this contention, but the facts on which they based both motions were the same. This rule is well established in this state. Weller v. Hammer, 43 Minn. 195, 45 N. W. 427; Griffin v. Jorgenson, 22 Minn. 92, and Irvine v. Myers & Co., 6 Minn. 394 (558).

And again, the motion was properly denied on the ground of appellants' laches. To be entitled to serve and file a supplemental complaint under G. S. 1894, § 5319, the plaintiff must proceed with reasonable diligence; and, if he neglects to make his application for an unreasonable time, the relief will be denied him. In this case appellants made no move towards obtaining leave to file this supplemental complaint from the time of the denial of the first motion, in March, until August following. In the meantime respondent proceeded with his duties as assignee, collected the property belonging to the trust estate, converted it into money, and paid certain preferred claims. Appellants make no attempt to excuse this delay in making the second application. The long delay, under the circumstances of this case, was unreasonable, and the motion was properly denied.

Order affirmed.

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SCANDINAVIAN-AMERICAN BANK v. MECHANICS BUILDING SOCIETY and Others.

January 18, 1900.

Nos. 11,902—(178).

Stockholders in Insolvent Corporation.

Evidence considered, and *held* that a finding of the trial court to the effect that the appellants are stockholders in the defendant corporation is sustained by the evidence.

Action in the district court for Ramsey county by a judgment creditor of defendant society to enforce the liability of defendant stockholders. Patrick Sexton, a creditor, filed a complaint in intervention. The case was tried before Jaggard, J., who found in favor of plaintiff and intervenor; and from an order denying a motion for a new trial, certain of defendant stockholders appealed. Affirmed.

Charles Bechhoefer, Stevens, O'Brien, Cole & Albrecht, T. R. Kane, and *Moritz Heim,* for appellants.

McLaughlin & Boyesen, for plaintiff respondent.

Morphy & Ewing, for intervenor respondent.

START, C. J.

This action was brought by a creditor against the defendant corporation and its stockholders, under G. S. 1894, c. 76, to enforce the liability of the stockholders for the debts of the corporation. The trial court found, as a fact, that the appellants were on December 5, 1894, and ever since have been, stockholders of the corporation; also all other facts essential to support its conclusion of law that the plaintiff and intervenor were entitled to judgment against such stockholders for the amount remaining due on their respective claims, after exhausting the assets of the corporation, not exceeding the amount of the par value of the stock held by each stockholder. The appellants appealed from an order denying their motion for a new trial.

The only question for our consideration is whether the finding of the trial court, as to the appellants being stockholders of the corporation, is sustained by the evidence. There is little, if any, con-

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flict as to the evidential facts, but the parties differ radically as to the inference to be drawn from such facts.

The Mechanics Building Society, a corporation organized under G. S. 1866, c. 34, tit. 2, was in July, 1891, doing business as a building society, and was then possessed of valuable assets, and had no liabilities except its stock. It is admitted that the appellants were then stockholders of the corporation, but they claim that they ceased to be such before the debts of the plaintiff and intervenor were contracted. The burden was upon them to establish such claim. At a meeting of the directors of the corporation on July 15, 1891, it was announced by the secretary that the plan upon which the society was organized was defective, and was not working satisfactorily. Thereupon it was voted that the affairs of the corporation be wound up as soon as practical, and that the secretary and attorney of the corporation be requested to organize a society on an improved plan, so that members who so wished could purchase stock therein upon withdrawing from the then present society. Such new society was formed and incorporated under the name of the Consolidated Building Society, and all the appellants surrendered their certificates of stock in the old society, which were cancelled, and took stock in the new society. It does not appear that all of the stockholders in the old society did so, or that the new society then had any assets. The new society continued business for about a year, when it determined to wind up its business. Thereupon, on December 5, 1892, the directors at a meeting adopted the following resolution:

"Resolved, that whenever and in all cases where the president and secretary of this society have issued its stock, and as a proposed and contemplated exchange for the stock of the Fifth Ward and Mechanics Building Society, that they are hereby authorized and directed to take up all stock of this society so issued, and to cancel the same; also to surrender to the proper stockholders their stock in the Fifth Ward or Mechanics Building Society."

The Fifth Ward Society mentioned in this resolution was another and similar building society which the Consolidated Society seems to have attempted to take over; that is, absorb its stockholders and assets. On the same day the directors of the old

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society, the Mechanics Building Society, adopted a resolution to the effect following:

"That in all cases where the secretary of this society has received the stock of any stockholder for the contemplated purpose of exchanging the same for the stock of the Consolidated Building Society, and has mutilated, disfigured, or cancelled the same, and in that condition now holds it in his possession, that the same shall be considered surrendered for new stock of this society, and the president and secretary are hereby authorized and directed to issue new stock to the stockholders in lieu thereof, in the same series and for the same number of shares."

No further action appears to have been taken by either society or its members to carry out these resolutions. The precise relations between the old and new society are left somewhat indefinite and obscure by the evidence. There is no evidence that there was any agreement or resolution whereby the old society was to transfer its assets to the new society, and it never did. Nor does it appear that there was any money or other consideration ever paid to the stockholders of the old society for surrendering their certificates. Such surrender seems to have been made pursuant to a notice to such stockholders by the secretary of the old society, who was also secretary of the new one, to the effect that the new society had been organized under a new plan, and that they could come in and cancel their stock in the old society, and take stock in the new one for it. It also appears that the secretary explained to such stockholders that the stock of the new society would be backed up by a transfer of the loans and assets of the old one. The stockholders so surrendering their certificates did not thereafter pay any dues to the old society, and none were required by it of any of its stockholders. The appellants paid dues to the new one for about one year. Four of the appellants, however, attended the meeting of the old society held on November 29, 1892, and voted thereat. There was also evidence tending to show that two of the appellants thereafter, and as late as December, 1895, took part as stockholders in proposed negotiations and arrangements for the preservation of the assets of the old society, paying taxes on its real estate, and making repairs thereon, until it could be sold at its actual value. Such arrangements, however, were not carried out.

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The foregoing evidentiary facts are substantially undisputed, and the appellants claim that the only inference that can be drawn therefrom is that the appellants ceased to be stockholders when they surrendered their certificates of stock in the old society, and that the trial court was bound, as a matter of law, to so find.

It is true, as their counsel claim, that, there being then no debts, they had a right to surrender their stock, and sever entirely their connection with the society. But did they intend to absolutely surrender, without consideration, their interest in the assets of the old corporation—that is, in its capital stock—when they so surrendered the evidence of their stock for cancellation? It seems unreasonable to believe that they did so intend. The certificates of stock in the new society gave them no interest in the assets of the old society (without which the new shares were worthless), unless all of the stockholders of the old society exchanged their stock for that of the new society, or the latter in some other way acquired the assets of the former. It is more reasonable to believe that the surrender of their stock certificates by the appellants was merely tentative, and that they intended to and did retain their interest in the old society and its assets until the scheme for organizing a new society, on an improved plan, which should absorb the stockholders and assets of the old society, should be fully consummated, which was never done. The conduct of the appellants, in the absence of any explanation by them, cannot be rationally explained upon any other hypothesis.

We are of the opinion that the trial court was not required to find, as a matter of law, that the appellants ceased to be stockholders in the old society when they surrendered their stock certificates for cancellation, and received therefor similar certificates in the new company. On the contrary, we hold that the finding of the court complained of is fairly sustained by the evidence.

Order affirmed.

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MOBILE FRUIT & TRADING COMPANY v. EDWIN G. POTTER.

January 18, 1900.

Nos. 11,921—(159).

Sale of Fruit to Undisclosed Purchaser—Exception to Charge of Jury.

In this action the plaintiff seeks to charge the defendant with the purchase price of a car load of fruit sold in transit by him as its agent to purchasers unknown to the plaintiff, who refused to accept the fruit on its being tendered to them on its arrival, and whose names the defendant refused to disclose to the plaintiff to the end that it might have recourse against them. It is *held*: (1) That the complaint states a cause of action. (2) That the trial court did not err in denying the defendant's motion to dismiss the action, or in refusing to instruct the jury to return a verdict for the defendant. (3) That it was not reversible error for the court to exclude certain offered evidence as to the grade of the fruit. (4) No exception lies to a failure of the trial court to instruct the jury on a given point, unless requested in writing so to do.

Action in the district court for Hennepin county to recover $197.51 with interest, as the balance of the price of a car of bananas sold by defendant on plaintiff's account. The case was tried before Elliott, J., and a jury, which rendered a verdict in favor of plaintiff for $209.02; and from a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Stiles & Stiles, for appellant.

Charles S. Cairns, for respondent.

START, C. J.

The here material allegations of the complaint are, in effect, these:

The plaintiff is engaged in the handling and shipping of bananas at Mobile, Alabama, and the defendant is a jobber and broker for the sale of fruit at Minneapolis. On June 30, 1898, the plaintiff was the owner of a certain car load of bananas, consisting of 425 bunches, then in transit by rail from Mobile to some northern market for sale. The plaintiff then employed defendant as its agent to sell the bananas in transit at Minneapolis, the same to be delivered to purchasers as of the date of shipment free on board cars,

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Mobile, Alabama. The defendant on that day sold the car of bananas, as such agent, to parties unknown to plaintiff, for and at the price of 80 cents per bunch, free on board of cars at Mobile, and for $340 in all, and so represented and reported to plaintiff on June 30; and by reason only of such report, and at defendant's request in that behalf, plaintiff diverted, shipped, and delivered the car of bananas to defendant for such purchasers, who wrongfully refused to accept the fruit upon the tender thereof by the defendant on its arrival in Minneapolis. The defendant reported this fact to the plaintiff by telegram, saying fruit was very ripe, and asking if he should handle to best possible advantage. The plaintiff, relying upon this report, wired the defendant to use judgment, and protect plaintiff's interest; that the purchasers should accept the fruit; that the car of bananas was not then ripe to any appreciable extent, and it was the duty of defendant to deliver the fruit to the purchasers on its arrival, and to insist on its acceptance by them, and to report to plaintiff to whom it had been sold. But the defendant failed and refused to so insist, and failed and refused to report to the plaintiff the names of such purchasers, whereby plaintiff might have recourse against them, notwithstanding the plaintiff did, on June 30, and at other times, request of defendant the names of such purchasers. The defendant then and there sold the fruit to such persons as he saw fit, and on July 15, 1898, paid to plaintiff, on account of such car of fruit, the sum of $142.49, and has failed and refused to pay plaintiff any other or further sum therefor, which sum was received by plaintiff as part payment by defendant for and on account of the car of bananas.

The answer denied the allegations of the complaint, and alleged as an affirmative defense that the car of bananas was consigned by the plaintiff to the defendant, to be sold by him as a commission merchant; that he received the fruit, and with due diligence, and in the usual course of business, sold the same upon the market to the best advantage, at the request of the plaintiff, and for its sole account and risk, for $319.40, the full market value thereof, and paid to the plaintiff the net proceeds of the sale. The reply put in issue the new matter set forth in the answer.

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The trial court instructed the jury, in effect, that if they found that the defendant, as plaintiff's agent, actually sold the fruit when in transit to purchasers to the plaintiff unknown, and that when the car arrived the purchasers refused to accept the fruit, and the defendant refused on request to give the names of the purchasers to the plaintiff, he would become the principal in the purchase, and liable for the contract price of the fruit. No exception was taken to this instruction, and the jury returned a verdict for the plaintiff for $209.02, the contract price less the admitted payment. The defendant appealed from the judgment entered upon the verdict.

1. The defendant's first point is that the complaint does not state a cause of action, for the reason that it does not allege that, if the defendant had disclosed the names of the purchasers, the plaintiff would have been able to have recovered and collected the purchase price of the fruit of the purchasers. No other objection is made. If the objection to the complaint is to be construed as raising the point that it is not alleged that the purchasers were financially responsible, so that the purchase price could have been collected of them, the point is not well taken, for the reason that the plaintiff could not have any knowledge in fact upon the question, as the defendant refused to disclose the names of the purchasers. Besides, it will be presumed that the purchasers were solvent, and that the defendant did not, in violation of his duty, sell to irresponsible parties. If, however, the real objection to the complaint is that it does not allege facts entitling the plaintiff, prima facie, to recover from the purchasers, it is without merit, as a reading of the complaint will demonstrate.

2. Assignments of error 2 and 3 are to the effect that the trial court erred in not granting defendant's motion to dismiss the action at the close of the plaintiff's evidence, and in refusing to instruct the jury to return a verdict for the defendant. This raises the question whether there was any evidence in the case to support the verdict. All of the evidence as to the transactions between the parties as to the car of fruit was documentary, consisting of telegrams and letters. We have attentively considered the evidence, and are of the opinion that it is sufficient to sustain the verdict.

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There was no controversy on the trial that the defendant did not, as the agent of the plaintiff, sell for it to actual purchasers a car of bananas then in transit from Mobile to some northern market for $340, free on board of cars at the latter place; that the purchasers, on arrival and tender to them of the fruit, refused to accept it; and that the defendant, although requested so to do, refused to inform the plaintiff of the names of the purchasers, to the end that it might have recourse against them. But the defendant claims that, after the purchasers refused to accept the fruit, it was consigned to him as a factor by the plaintiff to sell for it to the best advantage, and that he did so. This is the defense alleged in his answer, and it was the theory upon which the case was tried on his part. He here claims that such defense was conclusively established by two telegrams between the parties. The first was from the defendant to the plaintiff after the car arrived at Minneapolis, and was in these words: "Car is very ripe. Shall we handle best advantage? Answer quick." Plaintiff answered: "Use judgment, and protect our interests. Purchasers should accept fruit." Standing alone, this would tend to support the defendant's defense, but the evidence must be considered in connection with the further fact that the plaintiff demanded the names of the purchasers, and the defendant refused to give them. So considered, the jury might fairly infer that it was not the intention of the plaintiff to waive the sale, and consign the fruit to defendant to sell on its account, but that the intention was that the defendant should use his judgment in enforcing the contract against the purchasers; otherwise the proper answer to the defendant's telegram would have been, "Yes." The inference to be drawn from the telegrams and other evidence was a question of fact for the jury, and we cannot interfere with their verdict.

3. Alleged errors 3 to 13, inclusive, relate to the rulings of the court on the trial as to the admission or rejection of evidence. Several of these are to the effect that the court erred in excluding evidence on the part of the defendant to show that a part of the 425 bunches of bananas in the car were not of the grade or quality known as "Straights," but inferior thereto.

The claim of the defendant is that the proposed evidence tended to

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show that he disposed of the bananas to the best possible advantage, as alleged in his answer. The plaintiff's cause of action was based upon the claim that the defendant, by his conduct in the premises, placed himself in the shoes of the original purchasers of the fruit, and made himself liable for the purchase price thereof. The jury, under the instruction of the court, necessarily found by their verdict that the plaintiff's claim was established by the evidence. Such being the case, it would be wholly immaterial whether the defendant afterwards disposed of the fruit to the best possible advantage; and the verdict shows that the rejection of the evidence was not prejudicial error, for the jury necessarily found that the fruit was never consigned to the defendant to sell to the best possible advantage on plaintiff's account.

It is also urged that the proffered evidence was competent as tending to show that the original purchasers were not bound to accept the fruit. The evidence shows that the fruit sold in transit was represented by the plaintiff to be of the grade known as "Straights," a superior grade. It must be admitted that the defendant is entitled to make the same defense in this action that the original purchasers might have made if they had been sued for the purchase price of the fruit. But if they had been sued for the price of a car of bananas, no grade being specified, and they had denied by their answer the contract of purchase, and alleged as a defense that the fruit was consigned to them as commission men to sell on plaintiff's account, and at its risk, and that they had duly performed the contract (the answer in this case), would it have been competent, on the trial, for them to show that by the contract the fruit was to be of the grade known as "Straights," and that it was not so? Clearly not. The evidence offered by the defendant was not, under the pleadings, competent to show a justification of the purchasers for not receiving and paying for the fruit. If such an issue had been tendered, it would have been, as defendant claims, a material one; but the trouble is no such issue was made. The fact that the plaintiff proved more than was necessary to support the allegations of the complaint did not make the evidence competent.

Again, it is quite apparent from the record that the first reason

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here urged in support of the alleged error was the one purpose for which the evidence was offered. The trial court was not advised otherwise. The evidence conclusively shows that the only objection made to the fruit by the defendant prior to the trial was that it was overripe. It was not reversible error to exclude the evidence.

4. The only other alleged error meriting consideration relates to the charge of the court to the jury. No exceptions were taken to anything the court did say to the jury, but at the close of the charge the defendant excepted to it for the reason of its insufficiency and failure to give the general principles of the law controlling under the facts of the case, specifying them; to which the court replied:

"You cannot except to that unless you draw up a request before the charge is given. There can be no exception to a failure to charge, unless it is a failure to give a written request to charge."

No such request was presented, and the law was correctly stated by the trial court.

Judgment affirmed.

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JOHN W. CLARK v. GAAR, SCOTT & COMPANY.

January 18, 1900.

Nos. 11,926—(191).

Sale of Machinery upon Commission.

The defendant entered into a contract with the plaintiff and his partner, to whose interest the plaintiff has succeeded, whereby it agreed to pay them for a sale by them, as its agents, of certain machinery, 20 per cent. commission on the purchase price thereof. The notes of the purchaser, secured by a chattel mortgage, were given to the defendant for such purchase price. The commission was "payable as the notes are paid." A payment of $510.25 was made on the notes. Thereafter the defendant foreclosed the mortgage, and purchased the property at the foreclosure sale for the sum of $1,250 net,—a sum less than the amount due on the notes. The plaintiff brought this action to recover a commission on the total amount of such payments. *Held*:

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Foreclosure of Chattel Mortgage—Commission upon Sum Bid.

That, where a mortgagee is a purchaser of the mortgaged property at a foreclosure sale, the amount of the purchase price, as determined by his bid, if not paid over to the officer making the sale, is in legal effect so much money in his hands to be applied to the payment of his debt, according to the terms of the mortgage.

Commission on Payments upon Notes.

That by the terms of the contract the plaintiff was entitled to a commission on all payments on the notes as they were made, although the notes were not thereby paid in full.

Amount Due.

That the plaintiff was entitled to recover his commission on the total amount of such payments, including the $1,250 realized on the foreclosure sale.

Action in the municipal court of Minneapolis to recover $352.05 with interest as commissions under a contract. The case was tried before Kerr, J., who found that plaintiff was entitled to recover $102.05 with interest; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

Lawrence & Robb, for appellant.

John M. Rees, for respondent.

START, C. J.

The complaint alleges in effect that the firm of Clark & Lageson, of which plaintiff was a member, were employed by the defendant to sell for it a threshing-machine engine, separator, and stacker, for a commission of 20 per cent. of the money received on the sale of the engine and separator, as the same was paid, and 10 per cent. on the sale of the stacker, payable in the same manner; that the firm made the sale to John N. Hanson, and that the plaintiff has succeeded to all the rights of the firm in and to the contract; that the defendant received on the sale the following sums at the following times, to-wit: The sum of $125 on the stacker in the month of November, 1895, for which it paid the firm the sum of $12.50 commission, according to agreement; the sum of $510.25 during the fall of the year 1895, on the engine and separator; and the further sum of $1,250 on or about October 2, 1896. The prayer

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of the complaint is judgment for $352.05, the commission on the sums so received by the defendant.

The answer contains a general denial, but admits and alleges that the firm rendered services for the defendant, in making sale of an engine and separator to John N. Hanson, from whom the defendant took a chattel mortgage on such machinery for the purchase price thereof; that the defendant foreclosed the mortgage, and purchased the property at a foreclosure sale thereof on October 2, 1896, for the sum of $1,250; that Hanson never paid any part of the purchase price of the machinery, except the sum of $510.25, paid between November 7, 1895, and January 1 following; that the services of the firm in the premises were fully settled and paid by certain commission certificates issued to them by the defendant, whereby the commission was not payable until the notes given for the purchase price of the machinery were paid in full; and that none of them have been so paid. The reply admits the giving of the chattel mortgage, its foreclosure, and the purchase of the property by the defendant for $1,250, and puts in issue the other allegations of the answer.

The trial court made its findings of fact and conclusions of law, and directed judgment for the plaintiff for $102.05, the commission on the payment of $510.25, and no more. The court did not find whether or not the commission certificates mentioned in the answer were given and accepted in payment of the services of the firm in selling its machinery, nor was the court requested to find on this issue. The plaintiff appealed from an order denying his motion for a new trial. His principal contention here is that the trial court erred in not allowing him a commission on the payment of $1,250 arising from the mortgage foreclosure sale.

The evidence was undisputed that the parties entered into a contract whereby the defendant promised to pay to the plaintiff's firm, for an acceptable order from John N. Hanson for the purchase of the machinery in question, 20 per cent. commission on the purchase price of the engine and separator, and 10 per cent. on the stacker, payable as the notes to be given for the purchase price were paid. The order was obtained, accepted, and the sale made. The purchaser did not make any cash payment at the time of the

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sale, but gave promissory notes to defendant for the purchase price, as follows: Two for the stacker, for $125 each, due November 1, 1895, and three for the engine and separator, for $875, $625, and $750, respectively, due in the order named,—and secured the payment of the notes by a chattel mortgage to the defendant on the machinery. One of the $125 notes was paid, and the commission thereon. The sum of $510.25 was paid to the defendant on the other notes prior to January 1, 1896, and on October 2 thereafter, the balance due on the notes being unpaid, the defendant duly foreclosed the chattel mortgage, and at the foreclosure sale purchased the engine and separator for the sum of $1,250 net. Other than this, no payments have been made on the notes. The trial court found substantially the foregoing facts.

The evidence also shows that after the sale was made, and the notes and mortgage given, the defendant sent to the firm a commission certificate (so designated in the record), signed by it, for each note taken for the purchase price of the machinery, in which it was recited that the firm were entitled to a commission (stating the amount thereof) on the note of John N. Hanson (describing it), payable only when "said note has been paid in full"; and, further, that it was issued in accordance with the terms and conditions of the contract of agency between the parties. These certificates were received and retained by the firm, but the evidence is not conclusive, as defendant claims, that they were given and accepted in payment of the firm's services under the original contract.

As already suggested, the trial court made no finding on this issue. Therefore the question whether the trial court erred in rejecting the plaintiff's claim for a commission on the $1,250 must be determined by the contract of the parties as found by the trial court, without reference to the certificates. The record would indicate that the court disallowed the commission on the payment of $1,250, and allowed it on the payment of $510, for the reason that the latter was money received by the defendant on account of the sale, and the former was not. If a third party had purchased the property at the foreclosure sale, and the officer making the sale had paid the purchase price to the defendant, it would have been its duty to apply the amount so received in payment of the notes

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pro tanto. It would in such a case have been a money payment. In principle and legal effect there is no difference between such a case and the one we are considering; for, where a mortgagee is the purchaser of the mortgaged property at a foreclosure sale, the amount of the purchase price, as determined by his bid, if not paid over to the officer making the sale, is in legal effect so much money in the hands of the mortgagee, to be applied to the payment of his debt according to the terms of the mortgage. See Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730; Maudlin v. American S. & L. Assn., 63 Minn. 358, 65 N. W. 645; Truesdale v. Sidle, 65 Minn. 315, 67 N. W. 1004; Babcock v. American S. & L. Assn., 67 Minn. 151, 69 N. W. 718.

It follows that the plaintiff was entitled to recover the commission on the amount of the payment of $1,250, if he was upon the $510 payment. But counsel for defendant claims that he was not entitled to recover a commission on either amount. His contention is that the stipulation in the contract that the commission was "payable as the notes are paid" is to be construed as meaning that no part of the commission was due until one or more of the notes given for the purchase price of the machinery was paid in full, and that no one of them has been paid in full. The reasoning by which this conclusion is reached is substantially this: There is no evidence that the maker of the notes gave any direction as to the application of the payments; hence, the defendant had the right to make such application as would be most favorable to itself, and to apply the money in its hands as a partial payment on all of the notes, in such manner that no one of them would be paid in full.

Were the defendant's construction of the contract correct, it would have no right to so divide and apply the payments as claimed. Whatever may be the rights of the defendant, as between itself and the maker of the notes, as to the application of payments, it was bound, as to the plaintiff, to make an equitable application of them, and not an unreasonable and arbitrary one, in order to defeat the plaintiff's right to commission; otherwise, it might so apply payments that no more than six cents remained unpaid on any note, and still claim that the plaintiff was not entitled to anything. As between the parties hereto, the law will

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apply the payments to the extinguishment of the notes as they became due, for the reason that such is the natural and equitable application. If the payments be so applied, all of the notes save the last one would be paid in full. Hence, upon the defendant's interpretation of the contract, and even conceding that the certificates were substituted for the original contract, the plaintiff is entitled to a commission on the major part of the payment of $1,250, and upon the whole of the payment of $510.25. But it is apparent that the construction which the defendant seeks to give to the contract is not the correct one. The words of the contract as to the amount of the commission and the manner of its payment are these:

"Twenty per cent. commission on the engine and separator, and ten per cent. on the * * * stacker, payable as the notes are paid."

That is, just as the notes are paid. If by partial payments, then the commission on the amount paid on the notes is due. This is the obvious meaning of the contract. If it had been the intention to postpone the payment of the whole of the commission until the notes were paid in full, as defendant claims, then the simple way of expressing such intention would have been to have used these words: "Payable when the notes have been paid in full,"—the language of the certificates. The plaintiff was entitled to recover a commission on the full amount of the payments made on the notes, including the one of $1,250, and the trial court erred in allowing the plaintiff a commission on the $510.25 only.

Order reversed, and a new trial granted.

CITY OF ST. PAUL v. FREDERICK R. PECK.

January 18, 1900.

Nos. 11,957—(219).

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Inspection of Dairy Herds—Laws 1895, c. 203—Fee.

Laws 1895, c. 203, does not, by implication or otherwise, confer upon the city council of a city authority to impose an inspection fee for the inspection of dairy herds kept for the production of milk within the city.

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Same—City of St. Paul.

Ordinance No. 2042 of the city of St. Paul, in so far as it provides for such a fee, is invalid.

Defendant was charged in the municipal court of St. Paul with violation of Ordinance No. 2042 as amended by Ordinance No. 2059 of the city of St. Paul. The case was tried before Hine, J., and resulted in a judgment of conviction, from which defendant appealed. Reversed.

John L. Townley and *Thomas R. Kane*, for appellant.

J. E. Markham and *Franklin H. Griggs*, for respondent.

BROWN, J.

Laws 1895, c. 203, authorizes the city council of any city to provide by ordinance for the inspection of milk of dairies and of dairy herds kept for the production of milk within its limits, and to issue licenses for the sale of such milk therein. Under this authority the city council of the city of St. Paul duly passed and enacted an ordinance providing for such inspection, and imposing an inspection fee of 50 cents for each animal inspected, to be paid by the owner of the animal at the time of inspection. The defendant owns a dairy herd, and is engaged in the business of selling milk within the city of St. Paul. He duly applied for a license under the provisions of this ordinance, but his application was denied by the city authorities for the reason that he refused to pay the inspection fee. He continued his business without the license, and was arrested and convicted for a violation of the ordinance. He appeals from the judgment of conviction.

Although there are ten assignments of error, under some of which some minor questions may be presented, we dispose of the case upon the main and important question, whether the ordinance referred to, or rather that portion imposing the inspection fee, is a valid law. In its main features the ordinance is substantially similar to that involved in State v. Nelson, 66 Minn. 166, 68 N. W. 1066. The only difference between the two ordinances is that no inspection fee is provided for in the one involved in that case, while one is provided for by the ordinance here under consideration. As we conclude that the city exceeded its authority in im-

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posing such fee, it will not be necessary to consider any other question in the case.

The business of dairying, and of keeping and maintaining dairy herds for the production of milk for sale to the inhabitants of cities, has come to be a business of very large proportions in this state. Large quantities of such milk are daily sold to and consumed by such inhabitants, and it is relied upon and used as one of the principal articles of food. It is important that such milk be wholesome and pure, and considerations for the health of the citizen demand and require the passage and enactment of such police regulations as will prevent the maintenance of diseased animals from which such milk is obtained, and the selling and disposing of impure and unwholesome milk. There can be no question as to the validity of such laws. They are everywhere upheld. And the right of the legislature to confer upon cities the right and authority to enact them is also upheld. State v. Nelson, supra. Such laws are not enacted by the state, nor authorized to be enacted by cities or other municipalities, for the purpose of producing a revenue, but solely as police regulations, and in the interest of the public welfare. In cases where the authority is conferred upon cities, and such authority is silent as to license or inspection fees, the authorities all hold that the right to impose, as incident to the exercise of the power, such reasonable fees as are necessary to defray the legitimate expenses of administration, is implied. But fees and charges, whether denominated "license fees" or "inspection fees," which go beyond this, and tend to destroy or materially injure the industry, are not sustained.

And in this case, if the authority under which the city acted in passing the ordinance in question was silent on the subject, we should, if we followed the trend of authorities generally, have only to determine the question whether the fee imposed by the ordinance is within reasonable limits. But the ordinance is not silent, and we have for determination the proper construction of the statute under which it was enacted. What authority did the legislature intend to confer upon cities by Laws 1895, c. 203? The statute reads as follows:

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"Section 1. The city council of any city may by ordinance provide for the inspection of milk and of dairies and of dairy herds kept for the production of milk within its limits and issue licenses, for which no fee shall be charged, for the sale of milk within its limits and regulate the same, and may authorize and empower the board of health to enforce all laws and ordinances relating to the production and sale of milk and the inspection of dairies and dairy herds producing milk for sale or consumption within such city, and to appoint such inspectors, experts and chemists as are necessary for the proper enforcement of such laws and ordinances their compensation to be fixed by the city council, and such inspectors, experts and chemists shall be possessed of such necessary powers within the limits of such city as shall be prescribed by ordinance, but no such ordinance shall conflict with any law of this state."

To what do the words "for which no fee shall be charged" refer? To all that precedes them, or to the issuance of the license only? The question is by no means clear. Matter of punctuation is not an important item for consideration in the construction or interpretation of a statute. The intent of the legislature must be sought for, and such intent must control, without regard to the particular language used, or the punctuation marks employed.

When we have in mind the fact that the general laws of the state provide for a state dairy commissioner and numerous assistants, and confer upon that official and his aids powers similar to those conferred by this ordinance; the further fact that the state expressly licenses all milk dealers, and exacts from them the very nominal fee of $1 per year; when we have in mind that it should be the policy of the law to protect, rather than to hinder or destroy, a business so beneficial to the people; the fact, too, that the matter of inspection of such animals is a part and parcel of the proceedings leading to the issuance of the license,—it is not very unreasonable to suppose that the legislature intended by this statute, and by the use of the words especially pointed out, to withhold the right to impose any fee, either for inspection or for the license. Had it been understood that the statute in question, in its present form, carried with it the power and authority in the city council to impose an inspection fee which in the very nature of things would amount to much more than the nominal sum of $1, which the legislature deemed sufficient for a state license, some safe-

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guards and limitations would certainly have been added to the law, to the end that a business of so much importance, and so beneficial to the people, could not be rendered unprofitable by the imposition of excessive inspection fees.

The statute expressly provides that ordinances passed thereunder shall not conflict with any of the laws of the state. The state granted defendant a license under the general statutes for the term of one year, and the city in effect annuls it, and destroys the privileges conferred thereby, by refusing him a city license except upon payment of an inspection fee. Here we have a square conflict between the authority of the state and of the city. The authority of the state is preserved and made dominant by the provision of the statute in question which restricts the ordinances of the city to such as shall not conflict with the laws of the state. This alone furnishes a strong reason for construing the statute as withholding the right to impose an inspection fee. The issuance of a city license is conditioned upon the payment of this fee, and it is not so clear but that, being so conditioned, and the license being refused if it is not paid, such inspection fee becomes, to all intents and purposes, a license fee, which it is conceded the city has no right to exact. The inspection is necessary to enable the licensing power to determine whether the applicant is entitled to a license, and it necessarily follows that the expense of ascertaining this preliminary fact is a part of the expense of the license.

In the light of all these considerations, we are of the opinion, and so hold, that the city council exceeded its authority in imposing an inspection fee as a condition for the issuance of a license under the authority conferred by Laws 1895, c. 203, and that to that extent the ordinance imposing it is invalid.

Judgment reversed.

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NICHOLS & SHEPARD COMPANY v. WARD SNYDER.

January 19, 1900.

Nos. 11,799—(174).

78 502
178 524
78 502
84 18

Contract of Infant—Executory and Executed Contract.

The contract of an infant is simply voidable, and in law there is a marked distinction between his executed contract and his contract merely executory. As to the latter he may always interpose his infancy as a defense in an action for its enforcement, and he is not bound by such a contract unless he has affirmed or ratified it after he has arrived at maturity by some sufficient act or deed.

Action in the district court for Mower county to recover $632.16 and interest on three promissory notes. The case was tried before Kingsley, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

E. E. Webster, for appellant.

Lafayette French and *A. W. Wright*, for respondent.

COLLINS, J.

The plaintiff (appellant) does not challenge the finding of the trial court that defendant was but 19 years of age when he executed and delivered to it the notes upon which this action was brought. Nor is it contended that the defendant has at any time expressly ratified the contract. But the contention of counsel is that a finding to the effect that at a certain time, while defendant was still a minor, he expressly repudiated the notes, and refused to pay the same, was without evidence to support it, and hence that the court erred in ordering judgment for defendant.

The finding is abundantly sustained by the proofs, but even if the specific point made by counsel, namely, that the language used by defendant when he refused to make further payments was not inconsistent with an affirmance of the validity of the notes, was well taken, the order appealed from would have to be affirmed. The notes were given for a grain separator,—a part of a threshing-machine outfit. As to the defendant the contract was voidable and executory,—to be executed in the future by payment.. In law

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there is a marked distinction and difference between the executed contract of an infant and his contract merely executory. The former is binding until it is disaffirmed or avoided; and the contracts considered in Goodnow v. Empire Lumber Co., 31 Minn. 468, 18 N. W. 283, and Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541, are examples of this class, conveyances of land being involved in each case. But an infant's executory contract is without binding force until it is confirmed. If an infant is sued on his executory contract before or after becoming of age, and he has not confirmed it since his majority, he may set up his infancy as a perfect defense. 2 Beach, Mod. Cont. § 1344, and note. And this distinction between executed and executory contracts was recognized by this court in Johnson v. N. W. Mut. L. Ins. Co., 56 Minn. 365, 374, 57 N. W. 934, and 59 N. W. 992, in which it was said:

"The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessaries: First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield."

No disaffirmance of such a contract is necessary, and the infant can only be bound when, after attaining or arriving at his majority, he has confirmed or ratified it by some word, act, or deed. He may, after reaching full age, affirm his voidable contracts, so that he will be bound by them. Bishop, Cont. § 937, and cases cited; 10 Am. & Eng. Enc. 644, and citations in notes. There is no claim in this case that defendant, after becoming of age, ratified or affirmed the contract. He had previously disavowed the notes by refusing to pay, and from that time on he did not use, nor did he exercise any control over, the separator. It was at his father's house. He became of age in April, 1894, and in July or August following the plaintiff's agent took possession and sold it.

Order affirmed.

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LOUIS NUTZMANN v. GERMANIA LIFE INSURANCE COMPANY OF NEW YORK.

78 504
82 116
82 117

January 19, 1900.

Nos. 11,856—(170).

Injury to Fellow Servant—Negligence of Master in Selection of Servants.

If a master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged; and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice.

Passenger Elevator.

In an action brought by a servant against the owner of a building to recover for injuries alleged to have been caused by the negligence and unskilfulness of a fellow servant while operating an elevator, it is *held* that on the evidence the question as to the exercise by the master of ordinary and reasonable care when selecting the servant whose negligence caused the injuries was for the jury.

Expert Testimony.

The manner of operating an hydraulic pressure elevator, and the training, skill, and experience needed by the operator, is not a matter of such common knowledge as to preclude the giving of expert testimony on the subject.

Action in the district court for Ramsey county to recover $15,000 damages for personal injuries. The case was tried before Kelly, J., who directed a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

How & Butler and *Carl Taylor*, for appellant.

The court erred in excluding expert testimony as to competency of the operator. As to the general rule, see Sneda v. Libera, 65

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Minn. 337. Though an elevator be a freight elevator, if the employer permits it to be used by employees for personal transportation, great care must be exercised in its operation. Wise v. Ackerman, 76 Md. 375. Elevators have frequently been held machines of such character as to render admissible expert testimony concerning the proper method of construction and operation. Union v. Blindauer, 175 Ill. 325; Kern v. DeCastro, 125 N. Y. 50; Bier v. Standard, 130 Pa. St. 446. Expert testimony has been received concerning the proper manner of constructing machinery and appliances of far simpler character. Neubauer v. Northern Pac. R. Co., 60 Minn. 130; Blomquist v. Chicago, M. & St. P. Ry. Co., 60 Minn. 426; Leslie v. Granite, 172 Mass. 468.

C. D. & Thos. D. O'Brien, for respondent.

COLLINS, J.

Defendant corporation was the owner of a nine-story office building in the city of St. Paul, in which plaintiff was employed as an assistant to the engineer, whose name was August Hanft. The latter's brother, Charles, was also employed in the building, as an elevator man. The plaintiff was injured by being thrown out of one of the elevators, known as "No. 3," while it was being operated by Charles Hanft, and thereupon brought this action to recover damages. In his complaint he alleged that his injuries were caused by the carelessness and negligence of Hanft in starting the elevator when plaintiff was attempting to take passage in the line of his duty or employment, and also alleged that at the time, and prior thereto, Hanft was inexperienced and without training or skill in the management of elevators, as defendant well knew, or should have known; and, further, that defendant had wrongfully, carelessly, and negligently employed him as an elevator operator, and had thereafter retained him in its employ as such.

No question was raised at the trial, and none has been on appeal, as to the sufficiency of the proofs to support the claim that Hanft's negligence caused the accident, and that plaintiff's injuries were the direct result. Nor is it disputed that they were fellow servants, and that the rule which relieves the master from the consequences of an injury suffered by his servant while in the discharge of his

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duty, when such injury has been caused by the negligence of a fellow servant (except as that rule has been changed by a statute of no consequence here), will prevent plaintiff from recovering unless there was an omission on the defendant's part to use reasonable care in the selection of Hanft for the purpose of managing and operating an elevator. To establish this omission the plaintiff introduced testimony which it is claimed by his counsel tended to support the allegation in the complaint as to Hanft's inexperience and lack of skill when employed, and up to the time of the accident, and that it failed to exercise reasonable and ordinary diligence when hiring Hanft and when keeping him in its service as an elevator man.

When directing a verdict, the court below held that plaintiff's proofs were wholly insufficient to make a case for the jury on the proposition that Hanft was in fact unfit and incompetent to have control of an elevator when the accident happened, and that defendant knew, or in the exercise of ordinary care should have known, of his unfitness and incompetency. We are unable to agree with the learned court below on these points. On the contrary, we are of the opinion that a case was made for the jury on these particular claims. The rule of law which governs in such cases is correctly stated as follows:

If the master has failed to exercise ordinary or reasonable care in the selection of his servants, in consequence of which he has in his employ a servant who, by reason of habitual drunkenness, negligence, or other vicious habits, or by reason of want of the requisite skill to discharge the duties which he is employed to perform, or for any other cause, is unfit for the service in which he is engaged, and if, in consequence of such unfitness, an injury happens to another servant, the master must answer for the damages suffered by such servant, unless the person injured had notice of the incompetency, or had equal opportunities with the employer to obtain notice.

This rule has twice been recognized by this court without comment. Bunnell v. St. Paul, M. & M. Ry. Co., 29 Minn. 305, 13 N. W. 129; Smith v. E. W. Backus Lumber Co., 64 Minn. 447, 67 N. W. 358.

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A brief statement of the facts as shown when the verdict was ordered must be given: The building was managed by defendant's agent, and he employed Hanft and put him at work on or about February 9. The accident happened on February 21,—some 12 days later. Hanft was then about 41 years of age, and when he applied for the place had never handled an elevator of any description. While it was not shown by the evidence, it is fair to infer, from what was proven as to his previous occupation and employment, that he was wholly unacquainted with the operation of machinery of any description, or with any kind of mechanical contrivances. Hanft had applied to the agent for a position, and when a vacancy occurred in the elevator force the latter inquired of the engineer if his brother was able to fill the place, and was informed that he would be with a little instruction and practice. Hanft was employed a day or two afterwards, the engineer having reported to the agent that he could do the work required. He was instructed by the engineer, and had practiced on the elevator at least two evenings before he was employed, and before commencing to run the elevators himself. Up to the time of the accident he commenced work at 7 o'clock p. m., running the elevator as it was needed until 12:30. He was night watchman from that hour until morning. There was little use for an elevator in the evening, and, according to the evidence of one of plaintiff's witnesses, all of his experience on No. 2 did not exceed one hour of steady running each night,—perhaps 12 hours, continuous work altogether.

Three of the Hale hydraulic pressure elevators were used, running side by side in the same cage or shaft, and numbered 1, 2, and 3. Nos. 1 and 2 were built alike, and were exclusively used for passenger service, while No. 3 was constructed for heavier loads, and was used for both passengers and freight. Each was operated by means of a rope or cable running perpendicularly, and a shifting lever; the latter being set upright inside a guard frame. In Nos. 1 and 2 the doors, guards, and levers were on the west side of the car. The operator always faced the door. To ascend, the lever was thrown by the person in charge to his right,—towards the north. To descend, it was thrown to the left,—towards the south. After starting, the lever, of its own motion, came to the center.

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To stop when in motion, the lever was thrown in a direction opposite to that used when starting, past the center, and then brought back to that point. A quicker stop could be made by grasping the rope or cable.

Now, on elevator No. 3 the door was on the west side, as in Nos. 1 and 2; but the guard and lever were on the north, so that the operator, instead of facing the door, stood with it at his left. There was some discrepancy in the testimony as to the manner in which the lever was thrown to set the car in No. 3 in motion, but the jury would have been justified in believing that to ascend it was moved to the left, while to descend it was pushed to the right; that is, the motion for starting was exactly the reverse of that required in Nos. 1 and 2. It was also shown that, as elevator No. 3 was counterweighted more heavily than Nos. 1 and 2, it ascended more rapidly with the same load. Because of these differences in the operation and manner of handling, it is obvious that a man with limited experience might be fairly well qualified to operate Nos. 1 and 2, and yet somewhat deficient when put in charge of elevator No. 3. In fact, Hanft admitted, when testifying, that he did not have as perfect control over No. 3 as he had over No. 2. Up to the night of the accident his work had been upon the latter, but that evening he used No. 3, because Nos. 1 and 2 were out of service. He had used No. 3 but a very few times when the accident occurred, and it is quite clear from what happened that he lacked experience and skill in its management.

It is the law of this state that a prima facie case of negligence is made out against the master if it be proved that at the time of his employment the servant whose negligence has caused another to be injured was unfit and incompetent to perform the service required of him, and the burden is then on the master to disprove his own negligence. Crandall v. McIlrath, 24 Minn. 127; Morrow v. St. Paul C. Ry. Co., 71 Minn. 326, 73 N. W. 973. And the question of negligence in the appointment or retention of a fellow servant alleged to be incompetent is ordinarily one of fact to be determined by the jury, if there is any evidence on the subject which may be properly committed to their consideration.

It may be that it did not conclusively appear from the evidence

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that Hanft was wholly unfit and incompetent to operate these elevators when he was employed by the agent; for he had received some instruction, and was not without practice in the management of No. 2,—very little, to be sure, but unquestionably of some value. And he was considered competent by his brother, the engineer, upon whose opinion the agent seems to have relied entirely when he put Hanft at work. The agent made no inquiries or investigation as to what had been done towards qualifying the man for the position, although he had been informed that instruction was necessary in order to render him capable and competent. He was advised and knew that to some extent, at least, skill and experience were required on the part of one who was to be intrusted with the management of such a mechanical contrivance as an elevator used for the carrying of passengers, and always dangerous to life and limb unless properly handled. He simply obtained a verbal report of some character as to Hanft's fitness for the work, and exactly what that report was is not shown by the record. On the whole evidence as to the exercise of ordinary or reasonable care in the selection of this servant by defendant corporation, the case was for the jury.

We are also of the opinion that the court erred when it refused to receive expert or opinion evidence bearing upon the subject of the amount of training and experience required to enable a person, previously unskilled, properly to operate the elevators in defendant's building, and as to whether Hanft's training and experience had been sufficient. The rule as to the admission of expert or opinion evidence is that the opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. On questions of science, skill, and trade, or others of the like kind, persons of skill may not only testify to facts, but are also permitted to give their opinions in evidence. The court below was of the opinion that the case was not one for expert testimony, because there was no question of skill involved in the operation of an elevator under hydraulic pressure, and put in motion by a shifting lever, and consequently expert testimony as to the training and

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experience needed to qualify an ordinary person to handle one was inadmissible.

It is true that matters of common observation are not proper subjects for expert testimony. And it is also true that any person riding in one of defendant's elevators can see that it is put in upward motion by pushing the lever one way, while to go down the lever is moved in the other direction. And a person riding on an electric car can see that the forward motion of the car is obtained by turning the revolving crank on top of the rheostat in one direction, while to reverse the motion the crank is turned the other way. And all know that the opening of the throttle of a locomotive will cause it to advance, and that closing the same will sooner or later cause it to stop. These are all matters of common observation, but have nothing to do with the subject-matter of the questions put to the witness.

Here was a mechanical contrivance for the transportation up and down of human beings. The questions naturally arising out of its use were: How readily can the operator stop or start at a given point? How difficult is it to regulate the speed? What are the consequences of a failure to properly control the machine? And how much judgment, nerve, and manual dexterity or strength are required to meet all of the various emergencies which may arise? Inexperienced persons, although possessed of more than ordinary intelligence, are not likely to prove capable of forming a correct judgment upon any of these questions, and need the assistance of those who possess peculiar skill and qualifications for the task. And it seems that defendant's agent fully realized the fact when he called upon the engineer for his opinion as to the ability of Hanft to do the work, and again when he accepted another opinion to the effect that the latter had acquired the necessary knowledge. The manner of operating an hydraulic pressure elevator, and the training, skill, and experience needed by the operator, is not a matter of such common knowledge as to preclude the giving of expert testimony on the subject. See Olmscheid v. Nelson-Tenney Lumber Co., 66 Minn. 61, 68 N. W. 605. Counsel for defendant do not seem to object to the form of the questions put to the witness

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who was produced as an expert, and we have not considered that matter.

Order reversed, and a new trial granted.

LAMMERT GERDES and Another v. SARAH M. BURNHAM and Another.

January 19, 1900.

Nos. 11,866—(189).

Foreclosure of Mortgage—Injunction.

In an action brought to restrain the foreclosure of a real-estate mortgage under a power, on the ground that a part of the money for which the mortgage and the note secured thereby was given had not been paid over by the mortgagee to the mortgagors, and to compel an accounting between the parties as to the amount actually due, it is *held* that the facts, as found by the trial court, were supported by the evidence, and that they warranted the conclusion of law based thereon.

Action in the district court for Chippewa county by Lammert Gerdes and wife against Sarah M. Burnham, as executrix of the will of Burton A. Burnham, deceased, and Amund I. Amundson, as sheriff of said county, to enjoin defendants from proceeding with the foreclosure of a certain mortgage for $1,400 executed by plaintiffs to decedent, and for an accounting, and other relief. The case was tried before Qvale, J., who found among other things that plaintiffs had received no consideration for executing the mortgage except $393, and ordered judgment in favor of plaintiffs that except to that amount the mortgage was without consideration and void, and enjoining the foreclosure for any greater sum. From a judgment entered pursuant to the findings, defendant executrix appealed. Affirmed.

Cobb & Wheelwright, for appellant.

A. J. Volstead, for respondents.

COLLINS, J.

The facts, as they appear from the record in this action, again remind us of the business methods of the late firm of A. F. & L. E. Kelley, although the transaction involved is unlike any heretofore

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before this court. The facts, as found below, were abundantly supported by the proofs, and fully justified the conclusion of law. The action was brought to restrain the foreclosure of a real-estate mortgage under the power of sale therein contained, and to compel an accounting; the plaintiff mortgagors admitting that there was due and unpaid about $400 of the mortgage debt, while the amount alleged and claimed to be due, as stated in the foreclosure notice, was in excess of $1,500. The facts, as they appeared, may be thus stated, in brief:

In 1896 the plaintiff Lammert Gerdes, a farmer, was the owner of 160 acres of land in Chippewa county, Minnesota. The Kelleys were then in business at Minneapolis, and assigned, under the insolvency law, on September 12 of that year. One of their agents was a bank located in a village near plaintiff's farm, of which M. S. Carl was cashier. Wishing to hire money, Gerdes applied to Carl, as cashier of the bank, for a loan, and the latter, on February 5, filled out a blank application, addressed to the Kelley firm, by which these plaintiffs applied for a loan of $1,400, offering as security a mortgage on the 160 acres. The application was duly signed, and then forwarded by Carl to the firm of A. F. & L. E. Kelley, at Minneapolis. This firm was then, for many years prior thereto had been, and for some months thereafter continued to be, the agents of one Burton A. Burnham, a resident of the state of Vermont, for making loans upon real-estate security, for collecting amounts thus loaned, for renewing loans, and for reinvesting moneys collected on account of loans previously made. At that time, and for at least four months subsequently, the firm had in its possession, or should have had, according to their books of account, from two to four thousand dollars of money which belonged to Burnham, and which had been received and collected for the purpose of loaning out upon real-estate security. The Kelleys then, and as such agents, prepared a note for the sum of $1,400, with coupons attached, payable to Burnham's order, and a mortgage upon plaintiffs' land, in which Burnham was named as mortgagee, and forwarded the same to Carl, that they might be properly executed and acknowledged by plaintiffs. March 23, 1896, the plaintiffs duly executed and delivered these instruments to Carl, as cashier, and

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he, as was his custom when acting as agent for the Kelleys, placed the mortgage on record in the office of the register of deeds for Chippewa county. After being recorded, the mortgage was sent to the Kelleys, together with the note, and by one of the firm both papers were delivered to another agent of Burnham's, in the month of June. The Kelleys failed to transmit the money, as agreed on, to the bank, although it was charged up to Burnham on their books as of June 11. Early in the month of August, Carl made a personal call upon the Kelleys, and received from them the sum of $393, and, except as to this sum, no part of the amount of $1,400 due on account of the note and mortgage, and the sole consideration therefor, was paid to plaintiffs or to any person for them. It was retained by the Kelleys.

Burnham died prior to May, 1897, and thereafter the defendant, Sarah M. Burnham, as the executrix of his last will and testament, commenced the foreclosure above referred to. On the facts found, of which we have given an outline, the court ordered judgment in favor of plaintiff mortgagors that, except as to the sum of $393, the note and mortgage were without consideration and void; and, further, enjoining the foreclosure of the mortgage in an amount exceeding that sum, with interest. The appeal is from the judgment.

We have stated that the findings of fact were sustained by the evidence, and, if this be true, it is clear that the judgment ordered was the proper one. Counsel for defendant seem to admit that there was no dispute over the facts, but their contention is over the conclusions to be reached therefrom. We think there is no ground whatever for a difference of opinion over these facts, or as to their legal effect. The bank acted for the Kelleys in receiving and transmitting applications, in obtaining signatures to the notes and mortgages, in recording the latter, in procuring abstracts, and, finally, in sending all papers to them. It is probable that as plaintiffs intrusted the note and mortgage to Carl, as cashier, without first receiving their money, the loss would have fallen upon plaintiffs if the money had, in fact, been paid over to the bank by Burnham or his agents, the firm of A. F. & L. E. Kelley. The bank could act as agent for the Kelleys for certain purposes in connection with

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the loan, and at the same time be constituted plaintiffs' agent to receive the money. But this was not the situation. The plaintiffs' application for a loan was addressed to the Kelleys personally. That firm was not made plaintiffs' agent for any purpose, either by the terms of the application or otherwise. The Kelleys were Burnham's agents, and his money was in their hands for investment in farm mortgages. They agreed to pay $1,400 of it over to plaintiffs, and did not do so. Burnham obtained possession of the note and mortgage, and the executrix sought to enforce it, although it was without consideration, except as to $393. That the Kelleys, by means of certain entries on their books of account, made the amount of the note a debit item as to Burnham, and a credit item as to their agent, the local bank, does not affect or change the real transaction.

But counsel for the executrix strenuously contend that Burnham paid full consideration for plaintiffs' note and mortgage through "an agreement" made between the Kelleys and Burnham's other agent, Mr. Dowly, in June, 1896, that the Spencer and Nelson mortgages, about to be paid, should "take the place" of the plaintiffs' mortgage. But from the record it is not made to appear that any agreement was made as to this, and, if there had been, an agreement entered into between Dowly and the Kelleys, both Burnham's agents, and with which these plaintiffs had nothing to do, could not operate to discharge him from an obligation to pay over the money, or to cause it to be paid over, to plaintiffs. It appeared from the evidence that when plaintiffs applied for the loan there was an incumbrance on the land, and that, to pay off and discharge the same, plaintiffs borrowed the necessary sum of money from the bank, giving a note therefor, with the understanding with Mr. Carl, the cashier, that, when the Kelleys remitted, this note should be paid out of the proceeds of the Burnham loan. And the claim of counsel is that plaintiffs have actually received their money by reason of this arrangement. As to this, it is enough to say that Burnham's agents, the Kelleys, were to pay out of his funds and to the plaintiffs the amount of money represented by the mortgage note. This has not been done, and, through the knavery of these same agents, the note and mortgage were placed

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in Burnham's possession. That the plaintiffs were able to borrow money elsewhere to relieve their needs temporarily, is their good fortune, but of no concern to the defendant executrix. Nor is it of consequence to her that the expenses of this action are borne by the bank, or that some sort of an arrangement has been made between the latter and plaintiffs respecting the temporary loan. The court below was right when making its rulings on those particular matters, as it was in its order for judgment.

Judgment affirmed.

CHARLES J. FERCH v. JULIUS KONNE and Others.

January 19, 1900.

78 515
82 147

Nos. 11,903—(179).

Action to Determine Boundary Line.

In an action brought under the provisions of G. S. 1894, § 5823, et seq., it is *held* that the evidence was sufficient to support the finding of the court as to the original location of a certain government corner between two sections, the evidences of which location by the surveyors had been obliterated.

Lost Corner—New Survey.

A survey made for the purpose of establishing lost corners on a standard parallel or correction line may be rejected in part because made under a mistake of fact as to the existence and location of a certain corner section, and yet be adopted by the court in so far as it was not controlled by such mistake.

Field Notes.

The government field notes gave the width of all sections on the north of the standard parallel, from section 33 to section 35, inclusive, at exactly 80 chains each,—240 chains in all,—from the southwest corner of section 33 (the corner claimed by the defendants as sufficiently identified) to the corresponding corner of section 36.

Rule for Locating Lost Corner.

In such a case, there being no surplus to distribute, the actual location of a lost closing corner between two sections lying south of the standard parallel is to be determined by measuring east or west, as the case may

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be, from the nearest standard corner, the distance shown by the government field notes. These notes and the original plats control in such cases.

Finding Sustained by Evidence.

The trial court fixed and established a lost closing corner at a certain specified distance west of an established section corner. On the evidence in this case, *held* correct.

Action in the district court for Lac qui Parle county to establish a boundary line. From a judgment entered pursuant to the findings of Powers, J., plaintiff appealed. Affirmed.

E. T. Young, for appellant.

F. L. Cliff, for respondents.

COLLINS, J.

This was an action brought under the provisions of G. S. 1894, § 5823, et seq., for the purpose of having the boundary line between sections 4 and 5, township 120, range 45, Lac qui Parle county, fixed and established, there being a dispute between landowners in each of these sections as to this line, arising out of the fact that the corner, as established by the government surveyors between those sections on the fifth standard parallel or north line of the township, was a "lost" corner. After a trial, the district court found certain facts, upon which it ordered judgment fixing and establishing the section corner between said sections 4 and 5 at a point on said standard parallel or town line 178 chains and 80 links west of the southwest corner of section 36, township 121, range 45, and

"That the section line between said sections 4 and 5 is a true line from a known and established section corner and government mound at the southwest corner of said section 4 and the point on said section line last above designated, viz., a point 178 chains and 80 links west of the southwest corner of said section 36, township 121, range 45."

The appeal is from a judgment entered in accordance with the order, and the principal contention is as to the exact location of the lost section corner before mentioned, plaintiff contending that it is west of the point fixed by the judgment.

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As before stated, the north line of these two sections is the fifth standard parallel or correction line. This brings the sections in the township north of this standard parallel to the west of those bearing the same numbers in the township south of the parallel, in theory, about 19 chains. The exact location of the corner between these sections 4 and 5 on their south line, and the exact location of the corner between sections 35 and 36, in the township north, on this parallel line, and about two miles east of the corner in dispute, were well known, and were agreed on by all parties, and the court acted upon this fact when trying the case and when making its findings. It stands conceded that the last-mentioned corner was a proper starting point for all surveys westward along the standard parallel, and it was at this point that a surveyor by the name of Moyer commenced when he established, in the year 1893, the corner in dispute, and other lost corners on the line. On the trial of the action this Moyer survey was relied on by both parties, and no testimony of any consequence was offered as to other surveys. The plaintiff claimed that this survey was absolutely correct in every detail, while the defendants insisted that it should, in part, be rejected, but adopted as to the remainder. The court seems to have agreed with defendants.

As before stated, Moyer's initial point was the section corner between sections 35 and 36, the southwest corner of 36 on the standard parallel, and from thence he ran a random line to the state boundary, nine miles west. At the boundary line he found an identified government corner. He then ran the line back to the starting point, the southwest corner of section 36. There was a surplus according to this survey, and this fact seems to be undisputed. In accordance with the rules of the general land office, Moyer distributed this surplus by apportioning the same to each quarter section along the entire distance. This threw the plaintiff's west line over onto land claimed by one of the defendants, the owner of the northeast quarter of section 5, and generally disturbed the previous understanding in that vicinity as to where the north and south lines were. The defendants do not complain of the rules adopted by Mr. Moyer, but insist that, had he observed those rules precisely as they are laid down, there would have been no surplus

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to distribute to the plaintiff or other landowners to the east. This claim is based upon a finding of the court to the effect that the southwest corner of section 33 on this standard parallel line, as located and marked by the government surveyors, was not a lost corner, but had simply become obliterated,—that is, no visible evidence remained of the surveyors' work; and that in fact this corner was at a point on the standard parallel line 240 chains west of the starting point, where it had been marked by one Julius Konne some 15 years before the trial, and had since been preserved by means of a fence post. If the evidence was sufficient to support this finding, it follows that Moyer should have terminated his survey to the west at this identified corner. His actual location of lost corners along the parallel would, in such case, be based upon a mistake of fact.

The corner of a governmental subdivision is where it was placed by the government surveyors, whether placed right or wrong. If the original post or monument has disappeared, or become obliterated, the site of its former location may be established by clear and satisfactory evidence. The location so shown and established will control. Beltz v. Mathiowitz, 72 Minn. 443, 75 N. W. 699. See also Stadin v. Helin, 76 Minn. 496, 79 N. W. 537. An examination of the testimony of the witnesses who were sworn upon this point convinces us that the finding was fully warranted. It need not be discussed, for it was clear and convincing. Nor was the court compelled to depend wholly upon the verbal testimony as to where the southwest corner of section 33 was originally fixed by the surveyors. The government field notes gave the width of all sections on the north of the standard parallel from section 33 to section 35, inclusive, at exactly 80 chains each (240 chains in all) from the southwest corner of section 36 to the corresponding corner of section 33 (the corner claimed by the defendants as sufficiently identified). When Moyer made his actual survey on the ground in 1893, he found the distance from one of these points to the other to be that fixed by the field notes, substantially. The discrepancy was not five feet for the entire distance of three miles,—a difference hardly noticeable. This was strongly corroborative of the testimony of the witnesses who claimed to have seen the original stake, witness pits, and mounds.

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What has been said disposes of the claim of plaintiff's counsel that the Moyer survey must be taken as a whole, and must control. But he urges that the court below, although accepting and relying upon a part of Mr. Moyer's testimony and survey,—that pertaining to his work east of the so-called "Konne corner,"—wholly ignored the rules by which the lost corner should have been located, because no survey was ordered between the two established points. This claim is without foundation.

According to the rules of the general land office in force when Moyer made his survey (circular of 1883, and really not changed by the circular of 1896), lost or obliterated corners along a standard parallel or correction line are restored by proportionate measurements on the line, conforming as nearly as possible to the field notes, and joining the nearest identified original standard corners on opposite sides of the missing corner or corners, as the case may be, and then applying the rule:

As the original field-note distance between the selected known corners is to the new measure of said distance, so is the original field-note length of any part of the line to the required new measure thereof. The sum of the computed lengths of the several parts of a line must be equal to the new measure of the whole distance.

This is exactly what Moyer did, his error consisting only in failing to discover and accept the restored southwest corner of section 33 as the true corner. But from his testimony, and that of the witnesses who were with him,—the two surveyors who refused to accept his conclusions, or to join in his report,—it was conclusively established that the distance between the nearest identified corners, the southwest of 36 and the southwest of 33, was measured when running the line west, and was practically 240 chains, as it should have been according to law as well as the government field notes. There was, therefore, no surplus and no deficit in the sections lying between these two ascertained standard corners, and no circumstances or conditions for the application of the rule above stated, where, from a survey on the ground, it appears that there is a surplus or a deficit to be adjusted between the landowners. By actual measurement it had been ascertained that the field notes were correct, and that each of the sections was 80 chains in length on the

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line. This being established by the testimony, the court below had simply to determine, according to the rules, how far east or west from the proper corner was the closing corner between sections 4 and 5, for this point was the northwest corner of plaintiff's land, and a line drawn from that corner to the corner between these sections on their south line, over which corner there was no dispute, would, necessarily, be plaintiff's west boundary line.

It may also be noticed in passing that, even with this as his west line, his quarter section contains more than 160 acres. From the field notes and the original plats it appeared that the closing corner between sections 4 and 5 was located and fixed by the surveyors who subdivided the township at a point 18 chains and 80 links west from the nearest standard corner,—the southwest corner of section 34; and it was at this point that the court established it, in strict conformity to the original surveys, as required by G. S. 1894, § 836. This point being fixed, the order made by the court that the corner section between sections 4 and 5 on the standard parallel line be established and adjudged at a point 178 chains and 80 links west of the southwest corner of section 36 followed as a matter of course. It was not necessary, under the statute, for the court to direct a resurvey, and an actual location, by monument or otherwise, of the corner. If any dispute should arise in the future, the question can easily be settled by measurements.

Judgment affirmed.

J. THOMPSON & SONS MANUFACTURING COMPANY v. CHARLES J. FERCH and Another.

January 19, 1900.

Nos. 11,906—(177).

Offer of Judgment.

The right of a defendant to offer that judgment may be taken and entered against him in a pending action is purely statutory. It is created, in this state, in actions brought in justice's court, by G. S. 1894, § 4976, and in actions pending in district court by section 5405.

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Same—Municipal Courts—Laws 1895, c. 229.

Neither of these sections is applicable or of any force in actions brought in municipal courts established in accordance with the terms of Laws 1895, c. 229.

Taxation of Costs in District Court.

To obtain the reversal in this court of a judgment on the ground that the judge of a district court erred when, on appeal from the clerk's taxation of costs and disbursements, he held that a defendant was not entitled to costs and disbursements, under the last clause of G. S. 1894, § 5511, it must be clearly made to appear from the record that the amount originally recovered by the plaintiff was reduced more than one-half on appeal to the district court, or that the defendant was the successful party on the only matter litigated in the action.

Violation of Court Rule 15.

When counsel for both parties set a case down for oral argument in disregard of rule 15, statutory costs will not be allowed to the prevailing party.

In the municipal court of Ortonville plaintiff recovered judgment against defendants for $52.25, and defendants appealed on questions of law and fact to the district court for Big Stone county. In the district court the trial resulted in a verdict in favor of plaintiff for $30.05, and judgment was entered thereon, wherein plaintiff's costs and disbursements were taxed at $34.75. From the clerk's taxation defendants appealed to the court, C. L. Brown, J., which made an order affirming the taxation; and from the judgment and order of affirmance, defendants appealed to the supreme court. Affirmed.

A. B. Kaercher, for appellants.

F. L. Cliff, for respondent.

COLLINS, J.[1]

This was an action brought in the municipal court for the city of Ortonville to recover $45.73, alleged to be the balance due upon two promissory notes, and on account of goods, wares, and merchandise sold and delivered. The court in question was organized under the

[1] BROWN, J., having, when district judge, made the order affirming the clerk's taxation, took no part therein.

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provisions of Laws 1895, c. 229, the general law relating to the establishment of municipal courts in certain cities, and its powers are found enumerated in that chapter. Before answering to the complaint, the defendants filed a written offer that judgment might be taken and entered against them, on account of the claim made for a balance due for goods, wares, and merchandise sold and delivered, for $30.93, with interest and costs, but this offer was not accepted. Defendants then answered, setting up a counterclaim. The trial resulted in plaintiff's favor in the sum of $41.15, and $11.10 costs and disbursements. The defendants then appealed to the district court on questions of both law and fact, where the verdict was for $30.05 in favor of the plaintiff,—a few cents less than the amount of the offer for judgment. Costs and disbursements were then taxed against defendants by the clerk, and on appeal the clerk's taxation was affirmed by the judge of the district court. This appeal is from the judgment.

1. It is contended by defendants' counsel that their offer for judgment, which was made by virtue of G. S. 1894, § 4976,—a section which relates to justice's court,—precluded plaintiff from recovering costs and disbursements accruing subsequently, because the recovery in district court was for an amount less than that offered; and he also contends that, by virtue of section 5405, one of the general provisions relating to district courts, the result must be the same. But if it should be admitted that the provisions of the last-mentioned section apply to actions instituted in municipal courts organized under chapter 229, supra, the admission would be of no value to defendants, because the terms of that section were not complied with in the matter of service of the offer upon plaintiff.

In an action brought in justice's court, the statute is complied with by filing the offer in court, but, if the offer is made in an action brought in district court, it must be served on the adverse party. There is nothing of record to show that the offer was served, and, in fact, it requires some relaxation of the rule laid down in respect to returns to this court for us to hold that it appears that it was ever filed in the municipal court. But this is not very material, for there is nothing in the municipal court act which will justify us in holding that either of these sections applies to actions

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brought in municipal courts. There is no special provision in chapter 229 which incorporates either section into it, and there is no general provision by the terms of which it can be held that the procedure in district court, or in justice's court, in respect to offers for judgment, should be followed or be in force in courts organized under that act. Chapter 229 is wholly silent upon the subject, although it is evident it ought not to be. It is an unfortunate omission, for a defendant should have the privilege of making an offer of judgment at any stage of the proceedings, and thus prevent the accumulation of costs against him. But the right does not exist at common law, is wholly statutory, and not provided for, directly or indirectly, in chapter 229 or elsewhere. Because of this defect in the statute, the offer was without effect, and plaintiff was entitled to its costs and disbursements.

2. As we understand counsel for defendants, he makes the further claim that the last clause of G. S. 1894, § 5511, applies to actions brought to the district court on appeal from the municipal court in question, and, on the facts, that the clerk of the district court should have taxed costs and disbursements in favor of his clients. It is probably true that, by reason of sections 19 and 38 of chapter 229, the provisions of section 5511 are applicable, in a proper case; but it is evident that the recovery in the municipal court was not reduced one-half on appeal to the district court, nor does it appear from the record that defendants were the successful parties on the only matter litigated in the action. To have the benefit of section 5511, this must be clearly made to appear by the record.

3. Counsel for both parties disregarded rule 15, and caused the case to be set down for oral argument, although the amount involved was less than $100. For this reason, no statutory costs will be allowed to the prevailing party. Vaule v. Steenerson, 63 Minn. 110, 65 N. W. 257.

Judgment affirmed.

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ANDREW TUPP v. C. B. PEDERSON.

January 19, 1900.

Nos. 11,911—(175).

Contract of Infant.

Action in the district court for Polk county to recover $125.55 and interest on a promissory note. The case was tried before Watts, J., and a jury, which rendered a verdict in favor of defendant; and from a judgment entered pursuant to the verdict, plaintiff appealed. Affirmed.

A. A. Miller, for appellant.

Ole J. Vaule, for respondent.

PER CURIAM.

This action is upon a promissory note. The defense was that defendant executed the note when only 20 years of age. It appears from the record that the action was commenced nearly six years after defendant became of age, and that defendant never did anything after becoming of age to disaffirm the contract. Appellant claims that the minor, within a reasonable time after becoming of age, should have disaffirmed the contract, and, if he did not so disaffirm by some specific act, he ratified by implication. The question here involved is controlled by the decision in the case of Nichols & Shepard Co. v. Snyder, supra, page 502.

Judgment affirmed.

STATE v. ANDREW M. HULDER.

January 24, 1900.

Nos. 11,803—(23).

Grand Larceny—Indictment.

Indictment charging grand larceny in the first degree, in obtaining money from a railway company by falsely representing that defendant had been injured while in company's employ. *Held*, indictment states facts sufficient to constitute a crime.

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Evidence.

Certain assignments charging error in receiving evidence examined, and not sustained.

Judgment Sustained by Evidence.

Evidence examined, and found to sustain the judgment.

Defendant was indicted in the district court for Hennepin county for grand larceny in the first degree. The case was tried before Simpson, J., and a jury, and resulted in a verdict of conviction. From a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Frank D. Larrabee and *A. P. Loomis*, for appellant.

W. B. Douglas, Attorney General, and *C. W. Somerby*, Assistant Attorney General, for the State.

LEWIS, J.

The defendant was indicted for grand larceny in the first degree, and the trial resulted in a verdict of guilty. From the judgment entered thereon, defendant appeals.

Of the many assignments of error, only those will be considered which have been urged in the brief. All of the other assignments may be classified under three heads: First, as to error in the examination of certain jurors; second, in reference to the introduction of evidence; and, third, those directed to the refusal of the court to give certain requests. In the abundance of caution, we have examined all of these assignments, and find no one of them well taken, and it would add nothing of value to the disposition of the case to enter into a particular examination of those questions. It must be remembered that this court has established the rule that assignments not urged in the brief will be deemed to have been abandoned. Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Firemen's Ins. Co., 62 Minn. 315, 64 N. W. 902.

The indictment, in substance, charges that the said Andrew M. Hulder on March 1, 1898, at the city of Minneapolis, designing to cheat and defraud the Minneapolis, St. Paul & Sault Ste. Marie Railway Company of its property, did falsely and fraudulently pretend and represent to said railway company that he, said Hulder, on Jan-

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uary 19, 1898, at Armstrong creek, state of Wisconsin, while in the employ of said company, did receive bodily injuries, to wit, prolapsus of the rectum, through and by reason of the carelessness and negligence of said company, and said Hulder did then and there fraudulently demand of the said company the sum of $1,250 for said pretended injury, and the said company, believing all of said false and fraudulent statements to be true, and not knowing to the contrary, and relying thereon, paid said Hulder $1,250, whereas, in truth and in fact, the said Hulder did not on January 19, 1898, or at any other time, while in the employ of said company or otherwise, or at all, receive and sustain great and serious bodily injury, or any injury whatever, but, on the contrary, all of said statements, representations, and pretenses so made by the said Hulder were false, as he then and there well knew, etc.

The first objection urged against this indictment is that it does not state facts sufficient to constitute a crime, because the names of the natural persons to whom said representations were made are omitted. The argument advanced in support of this objection is that the defendant was deprived of notice as to the nature of the offense, which was necessary to enable him to prepare for trial. The objection does not go to the sufficiency of the indictment. State v. Turley, 142 Mo. 403, 44 S. W. 267. While a corporation can only act and speak, and be spoken to, through its officers and agents, it is nevertheless a person in law. G. S. 1894, § 6842.

The next objection advanced against the indictment is that it does not positively and distinctly set forth the offense, in this: that the truth of the statements alleged to have been made to the company is not denied. The gist of the representation made by defendant to the company is that at a certain time and place, while in the employ of the company, by reason of its negligence he suffered an injury, to wit, prolapsus of the rectum. The indictment states that defendant did not at any time receive serious bodily injury, or any injury whatever, but that all of said representations were false. There is no specific denial of the defendant's employment by the company, and no separate and specific denial that the company was negligent. The fact of employment is admitted, but

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the fact of the injury as stated by the negligence of the company is denied. The indictment is sufficient.

Again, it is urged that, if the denials above referred to are sufficient to negative the alleged statements of defendant to the company, then it appears conclusively from the evidence that an accident did occur, that defendant did receive an injury, and that within a few hours thereafter prolapsus of the rectum did occur. It is claimed that the court erred in receiving evidence of defendant's condition prior to the alleged accident. This evidence consists of the testimony of a physician who had treated defendant in July, 1896, for prolapsus of the rectum, and the testimony of a witness who testified to admissions by defendant in 1897 to the effect that he had suffered with that difficulty before that time. This evidence was proper, because it bears directly upon the effect of the injury which defendant claimed to have received January 19, 1898. If he had the rectal trouble one or two years prior thereto, such fact was proper to be taken into consideration in determining the effect of the injury, if any, received on January 19, 1898. But, says defendant, granted that he was treated for prolapsus 18 months prior, and that he had admitted being so afflicted, yet the fact that he had been working for the company seven months prior to January 19, 1898, and to all appearances was a sound and healthy man, was sufficient to establish as an undisputed fact that he had recovered, and, if he had a recurrence of the trouble immediately after the incident of January 19, it conclusively appeared to be the result thereof. It was for the jury to say from all of the evidence referred to whether the prolapse appearing after January 19 was the result of the occurrence of that date. For the same reason it was proper to receive the testimony of the physicians who treated the defendant, who testified as to statements made by defendant that he never had suffered from prolapse prior to January 19, 1898. The attorneys for defendant appear to have made objections to the introduction of testimony, and to have tried and submitted the case upon the theory that if it appeared that defendant had prolapse immediately after the occurrence of January 19, 1898, it was immaterial whether he had such trouble prior thereto. As before stated, it was com-

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petent to show the man's history in that respect, as bearing upon the truthfulness of his representations.

Defendant also argues to the effect that it appears clearly from the evidence that the company did not rely upon the said statements of defendant, and did not pay him the money because of the same, but that the company settled with him to get rid of him. It appears from the evidence that before making payment the officers in charge of the settlement were in possession of the facts as reported by the physicians. Defendant himself admits that he told Collins, the claim agent, that he had always been a sound and healthy man up to the time of the accident. Because the agent said he settled to get rid of him, it does not follow that he did not rely upon the truth of the statements that defendant had been so injured.

We are satisfied from a careful examination of the record that the defendant had a fair and complete opportunity to present his defense. The trial judge appears to have used every precaution to protect the interests of defendant, and to afford him every facility to maintain his defense. The case was submitted to the jury in an able and impartial manner, and the verdict and judgment are fully sustained by the evidence.

Judgment affirmed.

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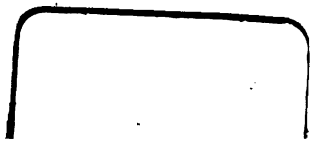

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